(29,622)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND RANDOLPH BRYANT, UNITED STATES DISTRICT ATTORNEY FOR THE EASTERN DISTRICT OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 26, 1923.

[fol. 1] IN THE

SUPREME COURT OF THE UNITED STATES

No. —

DAYTON-GOOSE CREEK RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES OF AMERICA et al., Appellees

Appeal from United States District Court, Eastern District of Texas

CAPTION

Be it remembered, That at a Special Term of the District Court of the United States, for the Eastern District of Texas, held in and for the Fifth Circuit, at the Court Room, in the City of New Orleans, Louisiana, on the 16th day of February, A. D., 1923.

Present, the Honorable R. W. Walker and the Honorable Alex C. King, United States Circuit Judges for the Fifth Circuit, and the Honorable Rufus E. Foster, United States District Judge, designated to hold sessions of the United States District Court in and for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial, and was tried, to-wit:

Style of Cause

No. 262. In Equity

DAYTON-GOOSE CREEK RAILWAY COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA et al., Defendants

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

In Equity. No. 262

[Title omitted]

ORIGINAL PETITION OF DAYTON-GOOSE CREEK RAILWAY COMPANY
Filed Dec. 6, 1922

To the Honorable the Judges of said Court:

The petition of Dayton-Goose Creek Railway Company, hereinafter called Complainant, exhibited against The United States of America, hereinafter called defendant, and against the Interstate

Commerce Commission, hereinafter called Commission, and against Randolph Bryant, United States District Attorney in and for the Eastern District of the State of Texas, respectfully shows:

One

That Complainant is a citizen of the United States of America and is a corporation created and existing under the laws of the State of Texas, with its principal office and principal operating office in the town of Dayton, Liberty County, State of Texas, in the Eastern District of said State, and within the Beaumont Division of said Eastern District, and is a citizen and an inhabitant of the State of Texas and of the Beaumont Division of said District; that Complainant is now and has been since a date long prior to the 29th day of February, A. D. 1920, a common carrier by railroad engaged in the transportation of freight and passengers, for hire, in intrastate, interstate and foreign commerce, and as such is now and was at all times herein mentioned subject to the Act of Congress entitled "An Act to regulate commerce, and for other pur-[fol. 3] poses," approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, also subject to the lawful provisions of the Transportation Act, 1920, approved February 29, 1920, and to all other lawful acts of Congress regulating railroads engaged in interstate and foreign commerce.

The United States of America have by Act of Congress consented to be sued by citizens of the United States in cases of this class, and have provided by law the method of service in such cases.

The Interstate Commerce Commission was created by and has been duly organized in pursuance of the Act of Congress entitled "An Act to regulate commerce, and for other purposes," approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, and has, holds, and exercises all of the lawful powers, duties, rights and privileges conferred upon said body in and by the terms of said Act, and by acts amendatory thereof and supplementary thereto; that Charles C. McChord is Chairman of said Commission, and Geo. B. McGinty is Secretary thereof, and each of them resides in the District of Columbia, and is an inhabitant of said District; that under the law said Commission is charged with the enforcement of all laws regulating and controlling common carriers by railroad engaged in interstate and foreign commerce and doing business in the United States; and that such Commission, acting under the said Acts of Congress and under the authority of the United States and under the laws of the United States, has the power to sue and to be sued, and that service of process upon the Secretary of said Commission or upon the Chairman of said Commission is sufficient service to require said Commission to appear, plead, and answer in all suits against it, at law or [fol. 4] in equity, in the courts of the United States, which are granted jurisdiction by law over suits against said Commission.

That Randolph Bryant is the duly and legally appointed, qualified and acting District Attorney for the United States, in and

for the Eastern District of Texas, and as such is charged with the prosecution of all offenses against the laws of the United States subject to prosecution within said district, and is charged with the duty of instituting and maintaining all prosecutions in the name of the United States for recovery of penalties against railroad companies for violations of laws for which penalties are fixed, and is also charged with the duty of acting for and on behalf of said Interstate Commerce Commission, as well as for and on behalf of the United States, in all such prosecutions and efforts at recoveries, and is also charged with the duty of conducting all such prosecutions at the instance of the Attorney General of the United States, or of the Department of Justice of the United States.

Two

That Complainant at all times herein mentioned owned and operated and now owns and operates, a line of standard gauge railroad extending from the said town of Dayton, in Liberty County, Texas, to Goose Creek and Baytown, in the County of Harris, State of Texas, with a trackage right over the line of road of the Trinity Valley & Northern Railway Company from said town of Dayton to a point north and east thereof, at a connection with the line of road of The Beaumont, Sour Lake & Western Railway Company. That at all times herein mentioned it has connected and interchanged traffic at the said town of Dayton with Texas & New Orleans Railroad Company, a common carrier by railroad constituting a part of [fol. 5] the Southern Pacific System of railroads, extending from the Pacific Coast to the City of New Orleans, State of Louisiana; and by means of the said Trinity Valley & Northern Railway Company, as an intermediate carrier, Complainant has at all times hereinafter mentioned interchanged and now interchanges traffic with the said The Beaumont, Sour Lake & Western Railway Company, which constitutes a part of a system of railroads extending from the City of Brownsville, Cameron County, Texas, on the Mexican border, to the City of New Orleans, State of Louisiana, known and operating as Gulf Coast Lines.

Three

That heretofore, to wit, on or about the 16th day of January, A. D. 1922, the Commission, on its own motion and without complaint, made and entered a certain order "In the Matter of Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15*a* of the Interstate Commerce Act, as amended," a copy of which order marked Exhibit "A" is hereto attached and hereby referred to and made a part hereof for all purposes, as fully as though herein set forth at length, said order being hereafter refered to as the 1920 order.

Four

That on or about the 16th day of March, A. D. 1922, the Commission, on its own motion and without complaint, made and en-

tered a certain other order "In the Matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15*a* of the Interstate Commerce Act for the year ended December 31, 1921," a copy of which last mentioned order, marked Exhibit "B," is hereto attached and hereby referred to and made a part hereof for all purposes as fully as though set forth herein at length, said order being hereafter referred to as the 1921 order.

[fol. 6] Five

That each and both of said orders were entered and made by the Commission for the purpose and with the design of enforcing those provisions of Section 15*a* of the Interstate Commerce Act, as amended, relating to the recovery by and payment to the Commission of so-called excess railway operating income and the establishment and maintenance of the reserve fund mentioned in said Section 15*a*, which section was added to the Interstate Commerce Act by an Act of Congress approved February 20, 1920, and known as the Transportation Act, 1920.

Six

That by the terms of the said 1920 order this complainant, was directed on or before the first day of February, 1922, to report to the Secretary of the Commission among other things, the following matters:

(*a*) The amount by which its net railway operating income for the period commencing March 1, 1920, and ending December 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the rules prescribed in said 1920 order, with explanation and details of the manner in which such so-called excess income was computed, or, in the event there was no such so-called excess railway operating income, to report that fact with corresponding calculations and details in support of the return.

(*b*) A statement of the title of the fund account in which one-half of any reported so-called excess income was placed; when such reserve fund was established; the amount placed in that fund, and how the assets in that fund are represented or held.

(*c*) The amount of the remaining one-half of the so-called excess income, computed according to said rules, previously paid to the Commission; and when and how so paid, if at all.

[fol. 7] (*d*) The value of the railway property of complainant, with a statement in detail of the manner in which such value was arrived at.

And by the terms of said 1920 order this complainant was further directed to pay to the Commission the one-half of such so-called excess income not paid into the reserve fund above referred to, by remittance to or draft in favor of the Commission, to be transmitted

to the Secretary of the Commission, concurrently with the filing of said report, unless previously paid; and a definite date for payment was in said order duly fixed and a definite demand for payment duly made upon complainant.

By the terms of the said 1920 order this complainant was directed by the Commission to report, on or before May 1, 1922, for the period commencing January 1, 1921, and ending December 31, 1921, substantially the same information with respect to its receipts, expenses, earnings, income, and property, and investment of funds, as was required by the 1920 order for the last ten months of the year 1920, as hereinabove set out; and by the terms of said 1921 order complainant was also directed in like manner to pay to the Commission one-half of complainant's so-called excess net income, and to place the remainder thereof in said fund, and a definite date for payment was in said order duly fixed, and a definite demand for payment duly made upon complainant.

For a more particular statement of the requirements and provisions of said orders, and each of the same, reference is here made to the copies thereof attached hereto, which are made parts of this petition and bill of complaint.

That the dates for the filing of the reports and payment of the sums of money required by the several orders above referred to, were from time to time extended by the Commission, but have since expired and the demands of the Commission upon complainant and the amounts thereof have become and now are definite and fixed.

[fol. 8]

Seven

That in pursuance of said 1920 order complainant duly filed with the Commission a return or schedule, a copy of which, marked Exhibit "C," is hereto attached and hereby referred to and made a part hereof for all purposes, as fully as though herein set forth at length, said return or schedule being hereafter referred to as the 1920 report.

Eight

And in pursuance of said 1921 order complainant duly filed with the Commission a return or schedule, a copy of which, marked Exhibit "D," is hereto attached and hereby referred to and made a part hereof for all purposes, as fully as though herein set forth at length, said return or schedule being hereafter referred to as the 1921 report.

Nine

That said reports truly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book values, according to the rules and requirements of the Commission, but neither of said values represents the true value of complainant's property, which is devoted to and used for common carrier purposes, and complainant especially denies that either such value is the true value of its said property, and avers that in making its reports it used such values

solely because it understood the rules of the Commission to compel complainant to use and set up such values from its books and records, and complainant duly reported to the Commission all the facts called for in each of said respective orders, in accordance with the rules prescribed in said orders, and in accordance with the books, records and accounts of complainant for the respective periods covered by said reports, as of the dates of said respective reports and as kept in [fol. 9] accordance with the accounting rules promulgated by said Commission. But said reports do not, and will not in the future, truly reflect the actual receipts, expenses and income properly and equitable attributable to said respective periods of time, as is more fully set forth below.

Ten

That upon consideration of the 1920 report the Commission has demanded that complainant pay to the Commission the sum of Ten Thousand, Eight Hundred Thirty Three and 12/100 Dollars ($10,833.12), that being one-half of the so-called excess income shown by said report; and upon consideration of the 1921 report the Commission has demanded that complainant pay to the Commission the further sum of Sixteen Thousand, Eight Hundred Eighty Three and 49/100 Dollars ($16,883.49), that being one-half of the so-called excess income shown by the 1921 report; said demands aggregating the sum of Twenty Seven Thousand Seven Hundred Sixteen and 61/100 Dollars ($27,716.61); and on the basis of said respective reports said Commission has also demanded, and the orders above described and Section 15*a* of the Interstate Commerce Act purport to require, that complainant set aside in a reserve fund, to be established by it for the purposes of said Section, like amounts aggregating an additional sum of Twenty Seven Thousand, Seven Hundred Sixteen and 61/100 Dollars ($27,716.61). A copy of the last demand made by the Commission, which was received by complainant on or about October 31, 1922, is attached hereto and marked Exhibit "E" and made a part hereof for all purposes, as fully as if herein set forth.

[fol. 10] Complainant says that the defendant and the Commission are in possession of the originals, or exact copies, of each and all of the exhibits hereinabove referred to, and Complainant here and now notifies the defendants, and each of them, to produce upon the hearing and upon the final trial of this cause the original reports made by the Complainant to the Commission, failing to do which, Complainant will offer secondary evidence of the contents of such reports.

Eleven

That said several orders and demands of the Commission and said requirements of Section 15*a* of the Interstate Commerce Act, and particularly said orders of the Commission for the payment of money and the creation and maintenance of said so-called reserve fund, and said demands for the payment of money and for the establishment

and maintenance of said fund, are and ever have been wholly void as to Complainant and beyond the power and authority of the Congress to enact and beyond the power of the Commission to direct, require or enforce, because in contravention of the Constitution of the United States in the respects more fully set forth below.

Twelve

That the provisions of Section 15*a* of the Interstate Commerce Act relative to the payment of so-called excess income to the Commission, and relative to the establishment and maintenance of the so-called reserve fund therein referred to, and the construction placed thereon by the defendants herein, and the administrative acts of the Commission in pursuance thereof, and the said orders and demands of the Commission in respect thereto, are each and all, as to Complainant, null and void and wholly invalid, for that the same, and each of them, are in contravention of the Fifth Amend- [fol. 11] ment to the Constitution of the United States, repugnant to both the spirit and letter of said amendment, and in direct conflict therewith, which said amendment provides that no person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the law, nor be subjected to arbitrary and unequal laws, and which said amendment prohibits the taking of private property for public use without just compensation; as will more fully appear from the specific objections, facts, conditions and reasons hereinbelow more fully set forth, to wit:

(*a*) The property of Complainant devoted to common carrier uses and purposes and owned by Complainant, while devoted to a public use, is nevertheless the private property of the Complainant, and remains its property notwithstanding such use; and the income, revenues, receipts, moneys, and profits arising from the use of said property as a common carrier, or otherwise, becomes, is and remains the private property of Complainant, and cannot, consistently with said amendment to the Constitution, be taken from the Complainant without due process of law, and cannot be taken by mere arbitrary enactment by the Congress of the United States; and to require Complainant to pay to the Commission, for the use of the United States, and to pay into said reserve fund, any part of the income or revenues arising from the use of said property, for the purposes set forth in said Section 15*a* of the Act to Regulate Commerce, or for any other purpose, is in violation of said Fifth Amendment to the Constitution of the United States.

(*b*) In like manner, Complainant, being the owner of said property and being entitled to the revenues, income, receipts, and profits therefrom, and being the owner of said revenues, income, receipts, and profits, is entitled to all the rights, privileges, and immunities incident to such ownership, including the liberty of ownership, [fol. 12] which is the right to use and dispose of said property by Complainant, according to its own judgment and without interference from any other source whatsoever, otherwise Complainant

would be denied the liberty of contract, the liberty of dominion over its property, the liberty of retaining and possessing its own, and the liberty of disposing of its own in such reasonable manner as it may see fit; and the taking of any part of Complainant's income, or compelling the investment thereof in any particular manner or for any particular purpose or restraining the expenditure thereof except for certain limited and restricted purposes, deprives Complainant of its liberty and property without due process of law, and is in violation of said amendment to the Constitution of the United States.

(*c*) The property of Complainant, which is devoted to common carrier purposes, being its private property, and the revenues, income, receipts, and profits therefrom being Complainant's private property, notwithstanding said property may be devoted to common carrier uses, continues Complainant's private property, subject to Complainant's complete dominion over it; and for the Commission or the United States to take said property, or any part thereof, for public uses, or to compel Complainant to invest the same, or any part thereof, in any particular manner or for any particular purpose, or to limit or restrict the expenditure or use thereof as provided by the reserve fund provisions of said Section 15*a* and of said orders, denies to Complainant the equal protection of the law and subjects it to unequal, arbitrary and discriminatory laws, because said requirements are not applied to nor enforced against the income of other persons or corporations or of other railroad companies, and is therefore in violation of said Fifth Amendment to the Constitution of the United States.

[fol. 13] (*d*) In like manner, Complainant is the owner of said property, and although devoted to public use, such property is still the private property of Complainant, within the meaning of the Fifth Amendment to the Constitution of the United States, and the revenues, receipts, income and profits, of every kind and character whatsoever, arising from the use of said property and accruing therefrom immediately becomes, is and remains the private property of Complainant, and no part thereof can be taken from Complainant by enactment of the Congress of the United States, by action of the Commission, or by action of the United States, for public use, without just compensation, because such taking is expressly prohibited by the Fifth Amendment to the Constitution of the United States; and Complainant avers that the involuntary payment by it of said money to the Commission or to the United States, as required by the terms of said Section 15*a* and demanded in the aforesaid orders, or the involuntary investment by Complainant of any part of said funds as required by the terms of said Section 15*a* and directed in said orders, would each and both be a taking of Complainant's property for public use without just compensation, and in truth and in fact without any compensation of any character whatsoever, and without due process of law.

(*e*) That all of the revenue, income and profits shown by Complainant in the aforesaid reports to the Commission, being made in

the manner and form required by the Commission, did not arise nor accrue from the collection of charges for transportation of persons or property, nor from services incident thereto; but a substantial portion of such net income arose and accrued to the Complainant from sources other than the transportation of persons and property and services incident thereto, and from other sources than the collection of rates, fares and charges and services incident thereto fixed [fol. 14] by the Commission; and such income arising from non-carrier sources is not charged in any manner with any public use nor is it in any manner affected with a public interest; and neither the Commission nor the law under which the Commission is acting makes any provision for the purpose of determining so-called excess income for a separation of the revenues derived from transportation or carrier services and charges and receipts therefor and incident thereto from those which accrued entirely independently of any carrier or transportation service; and if the Congress had the power to take private property for public uses which accrued to Complainant from carrier or transportation services or sources, it could not have and has not the power to take from Complainant any part of such rents, revenues, income, and profits which accrued to it from rentals, leases, trackage rights, interest or any source wholly disconnected and separated from its transportation or carrier services and the charges and receipts therefor. There being no means of separation provided by law or attempted by the Commission either in said orders or otherwise, the taking of Complainant's property is in direct violation of said Fifth Amendment to the Constitution of the United States, and would be without due process of law, and would, in contravention of said amendment, subject it to unequal, arbitrary and discriminatory laws.

(*f*) The line of railroad of Complainant, together with its equipment, facilities, appurtenances, privileges, franchises, and immunities, was owned and operated by Complainant, and had been continuously owned and operated for a long period of time prior to the 29th day of February, 1920, the date of the passage and approval of the Act of Congress of which said Section 15*a* is a part. At said [fol. 15] date, and long prior thereto, Complainant's properties were vested and fixed in it, and Complainant under the Constitution and laws of the United States held, owned and possessed the constitutional right to collect, receive, and retain, and to exercise complete, untrammelled and unrestricted dominion and control over all revenues, earnings, income, receipts, and profits produced by said properties under just and reasonable rates, charges and practices. All income and savings resulting from efficient and economical management, favorable location, and density of traffic accruing to Complainant under such rates, charges and practices, were, became, and remained the private property of Complainant, subject to its uses and reasonable disposition in such manner as Complainant should elect; but if the aforesaid terms and provisions of said Section 15*a* and said orders and demands of the Commission are enforced against

Complainant, and the revenues, income and profits earned by Complainant are taken from Complainant by the Commission for public or other use, such action would deprive Complainant of its liberty and of its private property without due process of law, and will deny to Complainant the equal protection of the law, and will take the private property of Complainant for public or other use without just compensation, in violation of the Constitution of the United States, and in violation of the fixed and vested rights, privileges, franchises, and immunities which Complainant had, held and possessed under the Constitution of the United States at the time of the passage of said law, and of which it cannot be divested in violation of said Constitution.

Thirteen

That all rates, fares, and charges collected or participated in and ultimately accruing to Complainant in and for each of the respective periods covered by the 1920 and 1921 reports, as between Com- [fol. 16] plainant and defendants herein, are, and of necessity must be held and deemed to be just and reasonable and non-excessive rates, fares and charges, and that defendants, and each of them, are precluded and estopped from denying or contesting the reasonableness thereof; that said rates, fares and charges, each and every, were made fixed and determined by orders of the Railroad Commission of the State of Texas and by orders of the Interstate Commerce Commission, and Complainant was bound to obey and observe, protect and enforce the same; that neither the Texas Railroad Commission nor the Interstate Commerce Commission has or had the power to prescribe other than reasonable rates, fares and charges for services performed by Complainant or any other railroad company in or incident to the transportation of persons and property, and Complainant says that neither the Commission nor the Congress of the United States has power to compel Complainant to refund to the public by paying to the Commission for public or private use, or to place in said reserve fund, subject to use only for certain limited and restricted purposes, any part of the rates, fares and charges collected by it; and every effort on the part of the Congress and the Commission, to compel the payment to the Commission of and part of the so-called excess earnings of Complainant for each and both of the aforesaid periods, is in violation of the Constitution of the United States, and more especially of the Fifth Amendment of said Constitution, is unlawful and unenforceable, for the reasons that:

(*a*) The Commission, acting upon the authority and direction of Congress as set forth in the Transportation Act, 1920, and in pursuance of the duties imposed upon it in that respect, in a proceeding known upon the docket of the Commission as Ex Parte 74, undertook to and did divide the railroads of the United States into groups, [fol. 17] and fixed such rates, fares, tolls, and charges for each group as in its judgment and opinion would produce the fair return upon the value of the property devoted to public uses for common carrier purposes, as provided for in said Act; and Complainant avers that

the rates so fixed by said Commission for the group comprising the territory in which Complainant is located proved to be wholly and utterly inadequate, and too low to afford, produce or raise the net revenue upon property devoted to carrier purposes as contemplated and provided for in the aforesaid Act; and if perchance Complainant was so favorably situated that by virtue of economy of operation or density of traffic or other causes it earned a net income upon the value of its property in excess of the amount prescribed by said Act, the same cannot nevertheless be taken from it under the terms of said Act, for the reason that all of the properties in the group of which complainant is a member, taken as a whole and averaged, earned far less than the net income authorized and allowed by said Act. Substantially all the traffic transported by Complainant during said respective periods passed over two or more railroads in the group of which Complainant was a member, and the traffic was subject to agreed divisions between Complainant and connecting carriers; and if by virtue of its favorable situation, the density of traffic, and the large amount of traffic originated by it on its line of road and exclusive to it, it was enabled to obtain such divisions from carriers as increased its earnings, it is nevertheless true that the carriers in the group of which Complainant is a member earned far less than the amount authorized and permitted by said Act, and therefore Com- [fol. 18] plainant cannot be segregated and singled out and have taken from it a proportion of said earnings which it was anabled to obtain by virtue of its favorable location and traffic control, and which substantially all arose from fair and just divisions with other lines less favorably situated as to density of traffic originated per mile of road operated by such other lines.

(*b*) Notwithstanding that the reports aforesaid show for the periods aforesaid certain net earnings in the manner in which the reports reflect the truth as of the respective dates of said reports, in so far as correct answers to the questionnaire of the Commission are concerned, yet, nevertheless, said reports do not reflect the true facts as to the property values devoted to carrier purposes, nor as to the total final net earnings of either period, but are subject to pending claims and to all such claims as may hereafter be presented against Complainant for which Complainant may be legally liable, including claims for alleged overcharges collected during each of said periods, for loss and damage to property, for injury to and death of persons, and for claims by shippers with respect to the reasonableness, justness or legality of the rates, fares and charges collected by or participated in during such respective periods by Complainant.

While the general level rates, as between Complainant and defendants, must be conclusively presumed to be reasonable, yet specific rates, as between Complainant and shippers paying such rates, are open to litigation and subject to claims that each and every rate is unreasonable. Such attacks made by shippers upon specific rates are constantly being prosecuted in the courts and before the Commission, and Complainant has reason to believe, and does believe and so charges, that some such complaints will be prosecuted against it on

[fol. 19] account of charges made and collected or participated in during the respective periods covered by said reports, and recoveries had by shippers therefor and expenses will be incurred in the defense of such claims, whether successful or not, and court costs and attorneys' fees will have to be paid by Complainant, and no refund can be made to it therefor under the law.

Complainant has no means of knowing what the aggregate amount of claims for overcharges, loss, and damage to property, injuries to or death of persons, and unreasonable rates, may amount to, and no means of estimating same, and does not and cannot know that when all of such claims are finally presented and determined they will not in the aggregate so reduce the net income of Complainant as shown in the aforesaid reports for both of said periods as that the so-called net income will be below what is authorized and provided for in said Section 15*a* of the Interstate Commerce Act.

All of such claims when established, for each and both of said periods, will be fixed liabilities of Complainant, and payment thereof by Complainant may be compelled and enforced by the holders and owners of such claims. Neither said Section 15*a* of the Interstate Commerce Act, nor the rules and regulations of the Commission in relation thereto, make any provision of any character through which any refund may be obtained from the Commission by Complainant on account of being compelled to pay any such claims for either period, and if it were within the constitutional power of Congress and the Commission to take the private property of Complainant in the manner provided for in said Act, the amount which the Commission might lawfully take under the terms of said Act cannot now be determined, and no amount could lawfully be taken until the exact amount could be determined or until Congress and the Com-[fol. 20] mission has made definite and adequate provisions for reparation to Complainant sufficient to indemify and protect Complainant against the payment of any and each and all and every of such claims for which Complainant's liability may subsequently be established, none of which has been done by Congress nor by the Commission.

Complainant avers that it cannot state or estimate the exact amount that it may be compelled to pay hereafter on claims for which it may be legally liable, accruing and maturing during the period covered by said reports, but upon information and belief alleges that such claims have accrued, that it is legally obligated to pay the same or at least some of them and will hereafter be compelled to pay the same, and that the aggregate of such claims will be a substantial sum of money, and that no provision is made by which Complainant may withdraw from the specially invested fund any part thereof, or be repaid by the Commission and the defendant-herein, or either of them, any sum of money so paid out by Complainant, or any part of such sum so paid out by it.

It is manifest, therefore, that whenever any claims are established as liabilities against Complainant, accruing during and justly chargeable against the periods covered by said reports and are paid by Com-

plainant, Complainant's private property will be taken without due process of law and without compensation, as the payment of any such claims necessarily will reduce Complainant's net income for such period below the amount shown on the report therefor and below the amount which the Congress of the United States declared by law to be reasonable for the periods stated.

(c) Complainant alleges that the defendants are estopped to deny, as between Complainant and defendants, the reasonableness of the rates, tolls, charges, and fares, and charges incident thereto, [fol. 21] collected or participated in by Complainant during the periods covered by the said reports, and that it is manifest from the law and the orders of the Commission that the defendants do not seek to take said sums of money from Complainant upon the theory that the rates, tolls, fares and charges collected or participated in by Complainant were unreasonable or unjust or excessive in any respect whatsoever. If it be true that said rates, tolls, fares, and charges for each and both of said periods were and are just and reasonable, then it is beyond the power of the defendants and of the Congress to take from Complainant the fruits of its service earned upon just and reasonable rates, tolls, fares and charges, and any such taking would be in violation of the Constitution, as hereinbefore more specifically set forth. If any specific rate, toll, fare, or charge, or any or all of the rates, tolls, fares and charges in effect during the periods covered by said reports were in fact unjust, unreasonable or excessive, then the persons paying such unjust, unreasonable or excessive rates, tolls, fares, or charges are, under the laws of the United States, entitled to reparation for and on account of such unjust, unreasonable or excessive rates, tolls, fares, or charges, and may lawfully compel Complainant to pay to such persons so paying such excess the amount of such excess received by Complainant, and through this process it is manifest that Complainant would be subjected to a double recovery and repayment and reparation on account of all rates, tolls, fares and charges which it collected or in which it participated that proved to be unjust, unreasonable, or excessive; and no provision is made in law or in the rules and reg-[fol. 22]ulations of the Commission, by which indemnity, protection, or reparation can be afforded Complainant on account of such double recovery.

(d) Complainant avers that a large and substantial proportion of the income earned or received by it and reflected in each and both of said reports as made to the Commission arose and accrued soley for and on account of rates, tolls, fares, and charges for the transportation of passengers and freight in intrastate commerce, conducted wholly within the State of Texas; that it is not within the power of Congress to take from Complainant the earnings, or any part of the earnings, accruing to Complainant from purely intrastate commerce; that to do so would be in violation of the Tenth Amendment of the Constitution of the United States, and any law

seeking so to do would be wholly void; that the defendant herein and the Commission cannot complain, nor can they, or either of them, nor can interstate and foreign commerce and persons engaged therein, nor either or any of them, be in any manner injuriously affected or in the slightest way prejudiced by large earnings on the part of Complainant accruing to it from intrastate commerce.

That if the receipts and income of Complainant from the handling and movement of intrastate traffic be unduly low, or amount to less than a fair return upon the value of the property devoted to that public service, manifestly the Congress and the Commission are prohibited by the Fifth and Tenth Amendments to the Constitution of the United States from further reducing those receipts by requiring a part thereof to be paid to the Commission and placed in the re- [fol. 23] serve fund contemplated by said Section 15*a*. And, on the other hand, if the receipts and income of Complainant resulting or accruing from the handling and movement of intrastate traffic are reasonably or sufficiently or even unduly high, then, and in every such case such receipts and income have and bear no such relationship to interstate or foreign commerce as will justify or create occasion for any interference with or regulation of or capture or recapture of the same, or any part thereof, by the Congress or the Commission under the power to regulate commerce with foreign nations and among the several states.

That, as the State is forbidden to complain of earnings in interstate commerce, or to place burdens thereon, or to take the receipts and avails therefrom, so also the law is that the fact that a carrier is engaged in both State and interstate commerce does not authorize, permit, or justify the Congress or the Commission in complaining of or taking or reducing excess earnings arising from the conduct of intrastate commerce, nor authorize the imposition by Congress of unjust and unreasonable burdens upon intrastate commerce, nor authorize nor permit the Congress or the Commission or the United States to take from the Complainant the earnings, or any part thereof, which accrued to Complainant on account of earnings by it in purely intrastate commerce. Neither the law nor the Commission has made or attempted to make any rule, regulation, or provision by which excessive earnings, if any, in intrastate commerce may be separated or segregated from the earnings of the carrier in interstate and foreign commerce, and no such effort at separation has been [fol. 24] made; and the Commission has demanded that Complainant shall pay to it not only all the so-called excess earnings earned by Complainant in interstate and foreign commerce, over which Congress has the power of control and regulation, but has also demanded that Complainant shall pay to the Commission all of its so-called excess earnings, including those accruing to Complainant for its services in purely intrastate commerce, the right to control which is expressly reserved, by the Tenth Amendment to the Constitution of the United States, to the State of Texas and to the people of the State, and is not subject to the control, regulation, or dominion of the Congress of the United States nor of the Commission.

Fourteen.

That complainant is informed and believes and charges that under the Act to Regulate Commerce, and amendments thereof and supplements thereto, and under the so-called Elkins Act and amendments thereof, defendants contend that Complainant, and each of its officers and directors, is subject to a fine in a sum not exceeding five thousand dollars ($5,000.00), for failure to comply with the demands of the Commission to pay to it and to pay into said reserve fund the said several sums of money hereinbefore set out. Complainant alleges that it is informed and believes and so avers, that the defendants contend that each of its officers and directors is subject to be prosecuted by the defendants herein, and particularly by the defendant Randolph Bryant, acting in his official capacity as United States District Attorney as aforesaid, unless said respective orders of the Commission are complied with and unless said respec- [fol. 25] tive sums of money, aggregating the sum of Fifty-five Thousand, Four Hundred Thirty-three and 22/100 dollars ($55,433.22) are paid to the Commission and into the so-called reserve fund, as required by said Section 15*a*, and demanded by said Commission; that the construction of said laws by the defendants is a constant and continuing menace to Complainant, for the reason that its officers and directors, other than its President, have small interests in the properties of the Complainant and cannot afford to take the risk of being prosecuted for violation of the laws of the country and being subjected to fines and humiliation on account thereof, nor can Complainant afford to ask them to take such risk in order to continue in its service, and upon information and belief Complainant avers that it is in constant, continuing and imminent danger of losing the service of its officers and directors, as they would probably resign if any such prosecution should be instituted, or for their own protection they might compel Complainant to pay said sums of money, which in the judgment of Complainant it does not owe and should not be compelled to pay. If such officers and directors should resign, Complainant could not procure others to take their places without giving them full and complete indemnity against financial liability, and as it cannot give indemnity to the present officers and directors, nor to any future officer or director, against the humiliation of being prosecuted for crime and against the annoyance and inconvenience of being haled into court to answer charges for violation of the laws of the country, Complainant is confronted with the constant menace of the resignation of its officers and directors, the inability to obtain others, and the consequent inability to perform its functions and discharge its duties as a common carrier, for failure to do which it would be subject to very severe and extreme penalties under the laws of the State of Texas and under the laws of the United States. [fol. 26] That prosecutions against said officers and against Complainant would practically destroy Complainant's ability to conduct its business and discharge its duties. If Complainant should pay said sums of money so demanded by the Commission to the Commission, and set aside said special fund as required in the orders of

the Commission, in order to avoid prosecutions and to enable it to continue to conduct its business, no provision is made in the Interstate Commerce Act or in the amendments thereof or supplements thereto, or in any other law of the United States, through, under, or by which such money could ever be recovered, though wrongfully paid, as the United States has never consented by law to be sued in any court for the recovery of any such sum so paid; and if Complainant be wrongfully advised in this respect, and if there be a method by which the courts could determine the liability in this respect and compel restoration to Complainant of any money paid by it to the Commission upon unlawful demand therefor, yet nevertheless the expense incident to a suit for that purpose would be very large, as such suit would have to be conducted in the District of Columbia, which is some twelve hundred miles from the situs of Complainant's property and its conduct of its business, and even if it should recover the sums of money so paid by it, it could not recover such expenses and could not recover the interest on said money which would remain in the hands of the Commission or in the hands of the Government for many years, pending a determination of the issues here involved.

[fol. 27] Complainant further alleges that if the validity of said orders and demands of the Commission and of said provisions of Section 15*a* of the Interstate Commerce Act be not challenged and tested in a proceeding of this character, the Commission will sue Complainant to require the enforcement of said orders and demands and for the recovery of said sums of money and for fines and penalties; that in any such suit there will necessarily be involved the issue of the value of Complainant's property devoted to the service of transportation and to common carrier purposes; that the proper solution of that issue will depend upon many facts, will involve many complexities, and the cost of making preparation for and the trial upon that issue, necessitating the employment of clerks, auditors, engineers, and other laborers and specialists, will be extremely burdensome; all of which may be avoided by the present form of action.

Complainant avers upon information and belief, that unless said several sums of money so demanded by said Commission are promptly paid, and said orders otherwise complied with, said Commission will undertake to prosecute Complainant, its officers and directors, for fines and penalties for failure to so pay, and that the defendant, Randolph Bryant, United States District Attorney, will be called upon by said Commission to institute prosecutions on account of the disobedience of said orders, and that he will in his capacity, as such United States District Attorney for the Eastern District of Texas, proceed to institute and vigorously push such prosecutions for the recovery of such fines and penalties.

All of the matters and things above alleged and charged would cause to Complainant irreparable injury, which could not be recov-[fol. 28] ered in damages, nor could it otherwise be made whole, and consequently Complainant is wholly without remedy at law for any relief against the wrongs, ills, trespasses and injuries herein com-

plained of, and, unless restrained by your honor's most gracious writ of injunction, will be wholly remediless against the same.

Complainant further avers that no damage or injury can or will result to the defendants if said prosecutions are enjoined and prohibited and the payment of said money is restrained, and Complainant here now offers to enter into bond, with good and solvent sureties, in amount and form sufficient and satisfactory to the Court, to guarantee the payment of all sums of money and the performance of every obligation on the part of Complainant which it may finally be adjudged to pay or to perform, and for all damages for such failure, and all interest on any sums of money which it may lawfully and ultimately be adjudged to pay.

For as much as your Complainant is wholly without any adequate remedy at law it avers that it will be wholly remediless unless protected by this Court's restraining order and writ of injunction.

Premises considered, Complainant prays:

(*a*) That a proper court be assembled, to which this petition and application may be presented and submitted;

(*b*) That on due notice to the defendants and to the Attorney General of the United States, and after hearing of this petition and application, this Court may issue its writ or process, temporarily staying and suspending the said orders of the Commission and each of them, so far as they relate to the payment of money to the Commission and into said reserve fund, and enjoining defendants and each of them from instituting or prosecuting any civil or criminal [fol. 29] suit or suits against Complainant or any of its officers or directors, or either of them, jointly or severally, until Complainant can present to the court, on a day to be fixed in said order, this its petition and application for an interlocutory injunction against the enforcement of said orders in the respects aforesaid;

(*c*) That after hearing, to be likewise held after due notice to the defendants and the Attorney General, there may issue out and under the seal of this Honorable Court a writ of temporary or interlocutory injunction, directed against the defendants, enjoining, restraining and suspending until the entry of the final decree the enforcement of said orders, and each of them, and the prosecution of Complainant or its officers or directors, jointly or severally, in the respects mentioned in this prayer;

(*d*) That on final hearing this Court enter its order perpetually suspending vacating, annulling and avoiding said orders of the Commission, and each of the same, as to Complainant, and perpetually enjoining and restraining the enforcement of said orders, and each of them, in all respects, and each and every attempt thereat; and,

(*e*) For all such other and further relief, at law or in equity, special or general, as Complainant, by virtue of the premises may be entitled to receive; and as in duty bound Complainant will ever pray.

(*f*) Complainant further prays for service of subpœna and process upon the Commission, which service may be made on Geo. B. McGinty, Secretary of said Commission; and for service of subpœna upon the United States, which service may be made by filing a copy of this petition in the office of the Secretary of the Interstate Commerce Commission and with the Attorney General of the United [fol. 30] States in the Department of Justice; and service of subpœna upon Randolph Bryant, United States District Attorney for the Eastern District of Texas, which service may be made upon him in person, in Grayson County, Texas, the county in which he resides, or in Jefferson County, Texas, where he is temporarily sojourning and may be found.

Dayton-Goose Creek Railway Company. R. S. Sterling, President. (Seal.) Attest: Lee Bryan (Lee Bryan), Asst. Secretary. (Seal.) Jno. C. Townes, Jr. (Jno. C. Townes, Jr.), Solicitor for Complainant and its General Attorney. Andrews, Streetman, Logue & Mobley (Andrews, Streetman, Logue & Mobley), Special Counsel. (Robert H. Kelley) Robert H. Kelley, (Frank Andrews) Frank Andrews, Of Counsel.

THE STATE OF TEXAS,
County of Harris:

Before the undersigned notary public in and for Harris County, Texas, on this day personally appeared R. S. Sterling, who being by me first duly sworn, upon his oath deposes and says:

That he is President of Dayton-Goose Creek Railway Company, and has continuously been such President since the organization of said company; that he is the chief executive officer in charge of the affairs of said company and familiar with its business and operations; that he has read the foregoing bill of complaint, and the matters and [fol. 31] things therein stated are true as therein stated, except such as may be stated therein upon information and belief, and as to those so stated affiant verily believes the allegations to be true.

R. S. Sterling.

Sworn and subscribed to before me by R. S. Sterling, this the fifth day of December, A. D. 1922, as witness my hand and seal of office. H. Millsapp, Notary Public in and for Harris County, Texas. (Seal.)

[fol. 32] EXHIBIT "A" TO PETITION

Interstate Commerce Commission

Washington

Order

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 16th Day of January, A. D., 1922.

In the Matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15*a* of the Interstate Commerce Act.

The Commission having under consideration the provisions of paragraphs (6) and (9) of Section 15*a* of the Interstate Commerce Act, reading as follows:

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof, shall, within the first four months following the close of the period for which such computation is made be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the new railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such sys- [fol. 33] tem. In the case of any carrier which has accepted the provisions of Section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided for in paragraph (4).

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of the year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

It is ordered:

(1) That the years or parts of years for which net railway operating income and the return represented by such income upon the aggregate value of railway property held for and used in the service of transportation are to be computed shall be the years or parts of years ending on December 31, respectively. In the case of any carrier which accepted the provisions of Section 209 of the Transportation Act, 1920, the first period for which such computations are to be made shall be September 1, 1920, to December 31, 1920, both inclusive. In the case of carriers which did not accept the provisions of said Section 209 of the Transportation Act, 1920, the first period for which such computations are to be made shall be March 1, 1920, to December 31, 1920, both inclusive.

[fol. 34]* (2) That the excess income for the portions of a year ended December 31, 1920, shall be preliminarily fixed as the income in excess of such proportions of 6 per cent on the value of the railway property held for and used in the service of transportation as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

(3) The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled " in the matter of the applications of carriers in official, southern and western classification territories for authority to increase rates", Docket No. — Ex Parte 74, with adjustments for—

(*a*) New lines, extensions and additions, and betterments;

(*b*) Retirements;

(*c*) Amounts of property for which permission to retain earnings under paragraph (18) of Section 15*a* of the Interstate Commerce Act has been granted; and

(*d*) Other increases or decreases, properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such rail-[fol. 35] way property as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of Section 15*a* of the Interstate Commerce Act, and corresponding adjustments in amounts recoverable by and payable to the Commission will be effected. In the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31,

1919, with proper adjustments as hereinabove indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of Section 15*a* of the Interstate Commerce Act.

(4) The establishment of preliminary bases for prorating the return of 6 per cent, or ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported.

It is further ordered, that pursuant to the foregoing rules and regulations for the determination and recovery of the excess income payable under Section 15*a* of the Interstate Commerce Act each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the Interstate Commerce Act, excluding—

(*a*) Sleeping car companies and express companies;

(*b*) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;

(*c*) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the [fol. 36] general transportation of freight; and

(*d*) Any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated and controlled by any State or political sub-division thereof, shall on or before February 1, 1922, report to the Secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income for the period ending December 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the foregoing rules, with explanation and details of the manner in which such excess income was computed, or, in the event there was no such excess railway operating income, that fact, with corresponding calculations and details in support of the return.

2. In cases where excess net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.

3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid the amount should be paid by remittance to or draft in favor of the Interstate

Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C.

[fol. 37] 4. The value of the railway property of the reporting carrier or carriers with a statement in detail of the manner in which such value is arrived at and a full explanation as to the method in which the values of properties of a group of carriers have been aggregated in cases where property values and income are computed for a system pursuant to the provisions of paragraph (6) of Section 15*a* of the Interstate Commerce Act. In such cases a full explanation should be given of the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, that an original report and three copies of the same shall be forwarded to George B. McGinty, Secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered that the original reports shall be made under oath signed and filed on behalf of the carrier by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

George B. McGinty, Secretary. [Seal.]

[fol. 38] EXHIBIT "B" TO PETITION

Interstate Commerce Commission

Washington

Order

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 16th Day of March, A. D. 1922.

In the Matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15*a* of the Interstate Commerce Act for the Year Ended December 31, 1921.

The Commission having under consideration the provisions of paragraph (6) of Section 15*a* of the Interstate Commerce Act, reading as follows:

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in

the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate [fol. 39] ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of Section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

It is ordered, that pursuant to the rules and regulations for the determination and recovery of the excess income payable under Section 15*a* of the Interstate Commerce Act, as defined in our order of January 16, 1922, modified as may be necessary in the case of each respondent for the year ended December 31, 1921, each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the Interstate Commerce Act, excluding—

(*a*) Sleeping car companies and express companies;

(*b*) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;

(*c*) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and

(*d*) Any belt line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political sub-division thereof, shall on or before May 1, 1922, report to the Secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

[fol. 40] 1. The amount by which its net railway operating income as defined in paragraph (1) of Section 15*a* of the Interstate Commerce Act, for the year ended December 31, 1921, was in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, with explanation and details of the manner in which such excess income was computed, or in the event there was no such railway operating income, that fact, with corresponding calculations and details in support of the return.

2. Where it reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was established, the amount placed in

that fund, and how the assets in that fund are represented or held, and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Interstate Commerce Commission and when and how such amount was paid. If the latter amount is unpaid, it should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C.

3. The value of such railway property used in earning the income reported for the year ended December 31, 1921, with a statement in detail of the manner in which such value is arrived at and showing the ownership and a general description of such railway property.

4. The foregoing requirements of this order are made subject to the following proviso, that in cases where two or more of said carriers constitute a group under common control and management and operated as a single system, as provided in paragraph (6) above [fol. 41] quoted, the foregoing matters shall be reported for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system, but shall also be reported in so far as practicable for each part of the system, and full explanation shall be made as to the method in which the values of properties of a group of carriers have been aggregated and the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, that an original report and three copies of the same shall be forwarded to George B. McGinty, Secretary, Interstate Commerce Commission, Washington, D. C. Report shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, that the original reports shall be made under oath, signed and filed on behalf of the carrier by its president, a vice-president, auditor, comptroller, or other executive officers having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

George B. McGinty, Secretary. (Seal.)

[fol. 42] EXHIBIT "C" TO PETITION

To the Interstate Commerce Commission:

Now comes Dayton-Goose Creek Railway Company, hereinafter called "carrier," and, in compliance with this Commission's order of January 16, 1922, in the matter of the recovery and payment of excess railway operating income under the provisions of Section 15a of the Interstate Commerce Act, files herewith a report of income

31, 1920, AND EXCESS RAILWAY OPERATING INCOME FOR THE INTERSTATE COMMERCE ACT

July 31, 1920	Aug. 31, 1920	Sep. 30, 1920
$592,981.43	$587,720.66	$591,911.08
.005	.005	.005
For Aug., 1920	**For Sep., 1920**	**For Oct., 1920**
$2,964.90715	$2,938.60330	$2,959.55540

May, 1920	June, 1920	July, 1920	Aug., 1920
27,261.92	$37,470.56	$27,926.99	$29,452.78
22,829.41	20,882.10	24,796.64	23,603.94
4,432.51	$16,588.46	$3,130.35	$5,848.84
$299.86	$299.86	$299.86	$299.86
.....	3,273.68	.....	658.13
$299.86	$3,573.54	$299.86	$957.99
4,132.65	$13,014.92	$2,830.49	$4,890.85
1,819.22	$2,764.67	$2,271.25	$681.41
4.17	4.17	4.17	34.95
1,823.39	$2,768.84	$2,275.42	$716.36
2,309.26	$10,246.08	$555.07	$4,174.49
2,860.29	$2,866.43	$2,934.25	$2,964.91
551.03*	7,379.65*	2,379.18*	1,209.58
275.51*	$3,689.82	$1,189.59*	$604.79
275.51*	$3,689.82	$1,189.59*	$604.79

and earnings and of the other matters referred to in said order, but the carrier states:

1

That said report is not filed voluntarily, but by compulsion and under protest, and for the sole purpose of avoiding prosecutions and possible penalties.

2

That this Commission has no lawful or constitutional right to require the carrier to make or file said report for the purposes set out in said order.

3

That so much of the Transportation Act, 1920, amending the Interstate Commerce Act, as purports to require the carrier to give up or pay over to this Commission any part of the carrier's earnings or income, is unconstitutional and void, for that the enforcement of so much of said Act against the carrier would deprive it of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

[fol. 43] That said order of the Commission, of date March 16, 1922, because based and wholly predicated upon Section 15*a* of the Interstate Commerce Act which was added thereto by Section 422 of the said Transportation Act, 1920, is likewise unconstitutional and void for that the enforcement of that portion of said order requiring the carrier to pay over to this Commission any part of its earnings or income, would deprive the carrier of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

5

The carrier protests against the accuracy of the preliminary bases prescribed in and by said order of the Commission, and all rights are expressly reserved to the carrier to object to any conclusions which may be reached by the Commission upon the report filed herewith, and to any report or order made thereon or in connection therewith, and to contest in all proper and legal ways, the enforcement of any order based upon said report or any part thereof, or upon said bases prescribed by the Commission, and to so contest all efforts of the Commission and of the United States of America to require the carrier to pay over to the Commission, or to any other person whomsoever, without its consent, any portion of the carrier's earnings, income, money or property.

Respectfully submitted, Dayton-Goose Creek Railway Company, By (Signed) J. J. Balderach, Vice-President.

(Here follows statement, marked side folio page 44.)

STATEMENT OF INVESTMENT IN ROAD AND EQUIPMENT, NET RAILWAY OPERATING INCOME, BY MONTHS, FOR THE YEAR ENDED DECEMBER 31, 1920, AND EXCESS RAILWAY OPERATING INCOME FOR THE TEN (10) MONTHS OF 1920, MARCH 1, 1920, TO DECEMBER 31, 1920, UNDER PROVISIONS OF SECTION 15a OF THE INTERSTATE COMMERCE COMMISSION

Investment in Road and Equipment

Oct. 31, 1920	Nov. 30, 1920	Dec. 31, 1920	Monthly Ledger Balances, Rate of Return, under Section 15a, 6% per annum or .006 mills per month.
$599,428.93	$617,424.89	$613,994.82	
.005	.005		
For Nov., 1920	For Dec., 1920		
$2,997,144.65	$3,087,124.45		Amount of Fair Return at 5% per annum.

Net Railway Operating Income

	Sept., 1920	Oct., 1920	Nov., 1920	Dec., 1920
Railway Operating Revenues	$32,579.82	$34,056.03	$31,943.79	$35,092.52
Railway Operating Expenses	20,306.89	22,732.39	25,960.22	33,655.60
Net Revenue from Railway Operations	$12,272.93	$11,323.64	$5,983.57	$1,436.92
Railway Tax Accruals:				
Ad Valorem, etc	$299.86	$299.86	$299.86	$299.86
Income and Excess Profits	2,298.36	1,984.56	271.39	.....
Total	$2,598.22	$2,284.42	$571.25	$299.86

Railway Operating Income	$9,674.71	$9,039.22	$5,412.32	$1,137.06
Deductions:				
Hire of Eqpt. Rents, Net (Accts. 503-507-536-540)	$1,646.71	$1,887.55	$2,162.50	$2,050.38
Joint Facility rents, Net (Accts. 508-541)	34.95	34.95	34.95	68.27
Total Deduction from Railway Operating Income	$1,681.66	$1,922.50	$2,197.45	$2,118.65
Net Railway Operating Income	$7,993.05	$7,116.72	$3,214.87	$981.59*
Less Returns at 6%	$2,938.60	$2,959.56	$2,997.14	$3,087.12
Excess Net Railway Operating Income	5,054.45	4,157.16	217.73	4,068.71*
Total Division under Section 15*a* for 10 Mo., March, 1920, to Dec. 31, 1920, I. C. C. 50%	$2,527.22	$2,078.58	$108.87	$2,034.35*
D. G. C. Railway Company 50%	$2,527.23	$2,078.58	108.86	$2,034.36*

Dayton, Texas, April 25, 1922.

J. J. Balderach, Vice-President and Treasurer.

* Deficit.

[fol. 46] EXHIBIT "D" TO PETITION

To the Interstate Commerce Commission:

Now comes Dayton-Goose Creek Railway Company, hereinafter called "carrier, and, in compliance with this Commission's order of March 16, 1922, in the matter of the recovery and payment of excess railway operating income under the provisions of Section 15*a* of the Interstate Commerce Act, files herewith a report of income and earnings and of the other matters referred to in said order, but the carrier states:

1

That said report is not filed voluntarily, but by compulsion and under protest, and for the sole purpose of avoiding prosecutions and possible penalties.

2

That this Commission has no lawful or constitutional right to require the carrier to make or file said report for the purposes set out in said order.

3

That so much of the Transportation Act, 1920, amending the Interstate Commerce Act, as purports to require the carrier to give up or pay over to this Commission any part of the carrier's earnings or income, is unconstitutional and void, for that the enforcement of so much of said Act against the carrier would deprive it of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

[fol. 47] 4

That said order of this Commission, of date March 16, 1922, because based and wholly predicated upon Section 15*a* of the Interstate Commerce Act which was added thereto by Section 422 of the said Transportation Act, 1920, is likewise unconstitutional and void for that the enforcement of that portion of said order requiring the carrier to pay over to this Commission any part of its earnings or income, would deprive the carrier of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

5

The carrier protests against the accuracy of the preliminary bases prescribed in and by said order of the Commission, and all rights are expressly reserved to the carrier to object to any conclusions

which may be reached by the Commission upon the report filed herewith, and to any report or order made thereon or in connection therewith, and to contest in all proper legal ways, the enforcement of any order based upon said report or any part thereof, or upon said bases prescribed by the Commission, and to so contest all efforts of the Commission and of the United States of America to require the carrier to pay over to the Commission, or to any other person whomsoever, without its consent, any portion of the carrier's earnings, income, money or property.

Respectfully submitted, Dayton-Goose Creek Railway Company, By (Signed) J. J. Balderach, Vice President.

[fol. 48] Dayton-Goose Creek Railway Company

Statement of Net Railway Operating Income

and

Excess Railway Operating Income Under Provisions of Section 15a

Year 1921

Railway Operating Revenues		$370,018.81
Railway Operating Expenses		258,333.81
Net Revenue from Railway Operations		$111,685.00
Railway Tax Accruals		$30,182.38
Ad Valorem	$4,111.51	
Income and Excess Profits, etc	26,070.87	
Uncollectible Railway Revenues		436.84
Total		$30,619.22
Railway Operating Income		$81,065.78
Deductions:		
Hire of Equipment Rents—Net (Accts. 503/507-536/540)		$7,923.88
Joint Facility Rents—Net (Accounts 508-541)		192.95
Total Deductions from Ry. Operating Income.		$8,116.83
Net Railway Operating Income		$72,948.95

Amount of returns at 6% per annum on Investment in Road and Equipment (See exhibit attached)...	$39,181.96
Excess of Net Railway Operating Income over 6% on Investment in Road and Equipment.....	$33,766.99
Division under Section 15*a*, I. C. C. 50%.....	$16,883.49
Dayton-Goose Creek Railway Company 50%.....	$16,883.50

Dayton, Texas, April 25, 1922.

J. J. Balderach, Vice-President and Treasurer.

Dayton-Goose Creek Railway Company

STATEMENT OF INVESTMENT IN ROAD AND EQUIPMENT AND RETURNS THEREON AT 6% PER ANNUM FOR THE YEAR ENDED DECEMBER 31, 1921

	Amount	Rate of return	Amount of return
Investment in Road and Equipment, Ledger Balance 12/31/20	$613,994.82		
Delayed charges and adjustments, year 1921	26,253.41		
Total	$640,248.23	6% per an.	$38,414.89
Additions and Betterments year 1921, see detail below	59,254.73		767.07
Total Investment in Road and Equipment	$699,502.96		$39,181.96

Additions and Betterments

A. F. E.	Project	Date completed and turned over to operation or retired	Length of time in service or retired to Dec. 31, 1921	Cost	Rate of return	
57	Office Equipment	April 30, 1921	8 mo.	$143.41	.005 per mo.	$5.74
21	Extension Depot, Goose Creek	Jany. 21, 1921	11 mo. 9 days	1,757.27	.005 per mo.	99.29
26	Sand House, Goose Creek	Jany. 21, 1921	11 mo. 9 days	485.83	.005 per mo.	27.45
27	Cattle Guards	Feby. 7, 1921	10 mo. 23 days	275.05	.005 per mo.	14.80
51	Water Station Abandoned	April 27, 1921	8 mo. 3 days	850.98*	.005 per mo.	34.46*
54	Bunk House, Goose Creek	May 7, 1921	7 mo. 23 days	900.00	.005 per mo.	34.95
48	Revetments and Dams—Retired June 11, 1921	May 12, 1921	1 mo.	1,463.71	.005 per mo.	7.32
49	Rail Rests	May 16, 1921	7 mo. 14 days	109.02	.005 per mo.	4.07

*Credit.

Additions and Betterments—Continued

A. F. E.	Project	Date completed and turned over to operation or retired	Length of time in service or retired to Dec. 31, 1921	Cost	Rate of return	
50	Property Line Posts	June 21, 1921	6 mo. 9 days	155.03	.005 per mo.	4.88
52	Corrugated Drains	June 22, 1921	6 mo. 8 days	314.66	.005 per mo.	9.84
2	Passing Track Baytown	June 30, 1921	6 mo.	5,356.53	.005 per mo.	160.70
58	Machinery and Tools	June 30, 1921	6 mo.	1,182.16	.005 per mo.	35.46
56	Right of Way Fences—Progress	June 17, 1921				
	to	July 13, 1921	26 days	1,735.12	.005 per mo.	7.52
46	Drain Ditch	March 26, 1921	9 mo. 14 days	524.96	.005 per mo.	24.80
74	Engine House	Feby. 28, 1921	10 mo.	211.40	.005 per mo.	10.57
61	Ballasting Fields Luttman's Spur	Sept. 15, 1921	3 mo. 15 days	466.75	.005 per mo.	8.17
56	Right of Way Fences	July 3, 1921	5 mo. 17 days	1,819.32	.005 per mo.	50.61
66	Foamite Fire Engine	Nov. 3, 1921	1 mo. 27 days	339.03	.005 per mo.	3.21
69	Extending Stem of "Y"	Nov. 13, 1921	1 mo. 17 days	114.08	.005 per mo.	.89
67	Rip Track Goose Creek	Nov. 17, 1921	1 mo. 13 days	249.82	.005 per mo.	1.79
2	Passing Track	Dec. 21, 1921	9 days	7,402.95	.005 per mo.	11.10
				$18,878.05		
	Less No. 2 above			5,356.53		
				$7,521.52		
	Less Retirements			118.57		
60	Stock pen Mt. Belview	Dec. 31, 1921	none	386.30	.005 per mo.	None
70	Stock pen Esperson	Dec. 31, 1921	none	347.30	.005 per mo.	None
53	Caboose	July 5, 1921	5 mo. 23 days	985.49	.005 per mo.	28.73
79	Retirement 4 flat cars	Dec. 31, 1921	none	2,780.00*	.005 per mo.	None
77	Retirement Loco. 101	Dec. 31, 1921	none	2,418.53*	.005 per mo.	None
72	Locomotive No. 104	Dec. 16, 1921	14 days	25,343.89	.005 per mo.	59.13
55	Ballasting Main line	Always in operation—see below		16,433.99	.005 per mo.	190.51

Monthly Balances:

June, 1921,	$93.18	1 month for July at .005 per mo	$.46
July, 1921,	820.27	1 month for Aug. at .005 per mo	4.10
Aug., 1921,	5,041.48	1 month for Sep. at .005 per mo	25.21
Sep., 1921,	8,307.49	1 month for Oct. at .005 per mo	41.54
Oct., 1921,	9,921.94	1 month for Nov. at .005 per mo	49.61
Nov., 1921,	13,918.65	1 month for Dec. at .005 per mo	69.59
Dec., 1921,	16,433.99		

Total Additions and Betterments and amount of Retirements ..... $62,453.56 — 767.07

Less Retirement of Revetments and Dams $1,463.71
Less Right of Way Fences, A. F. E. 1,735.12
Total Deductions, Additions and Betterments $3,198.83

Amount of Additions and Betterments shown above $59,254.73

Dayton, Texas, April 25, 1922.

J. J. Balderach, Vice-President and Treasurer.

*Credit.

[fol. 50] EXHIBIT "E" TO PETITION

Interstate Commerce Commission

Washington, October 20, 1922.

Mr. J. J. Balderach,
V. P. & Treas. Dayton-Goose Creek Railway Co.,
Dayton, Texas.

DEAR SIR:

Referring to our letter to you of September 23, 1922, in which the following statement was made:

"The returns as filed show excess income as preliminarily computed:

"For the 10 months ended December 31, 1920.....	$10,833.12
"For the year ended December 31, 1921.....	16,833.49
"Total	$27,666.61

"Under the terms of the orders one-half of this amount shall be placed in a reserve fund and the remaining one-half remitted to Mr. George B. McGinty, Secretary," etc., you are advised that the statement above quoted was made inadvertently through error.

Referring to the returns of the Dayton-Goose Creek Railway Company to the Commission's orders dated January 16, 1922, and March 16, 1922, "In the matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15*a* of the Interstate Commerce Act," you are now advised as follows:

The returns as filed show excess income as preliminarily computed:

For the 10 months ended December 31, 1920.....	$21,666.24
For the year ended December 31, 1921.....	33,766.99
Total	$55,433.23

[fol. 51] Under the terms of the orders one-half of this amount should be placed in a reserve fund, and the remaining one-half should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C. You are again requested to fully comply with the orders by:

(*a*) advising the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held;

(*b*) remitting promptly to the Secretary of the Commission the remaining one-half of the excess income so preliminarily computed.

Very truly yours, Charles D. Mahaffie, Director.

[fol. 52] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS AT BEAUMONT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Jan. 8, 1923

Answer of Interstate Commerce Commission

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraph One of the petition, the defendant, Interstate Commerce Commission, hereinafter called the commission, admits, for the purposes of this suit, that the allegations contained in said paragraph are true, except that the commission denies that it is charged with the enforcement of all laws regulating and controlling common carriers by railroad engaged in interstate and foreign commerce and doing business in the United States. The commission admits that, by paragraph (1) of section 12 of the interstate commerce act, it is authorized and directed to execute and enforce the provisions of said act.

II

Answering Paragraph Two of the petition, the commission admits, for the purposes of this suit, that the allegations contained in said paragraph are true.

[fol. 53]

III

Answering Paragraph Three of the petition, the commission admits that the allegations contained therein are true.

IV

Answering Paragraph Four of the petition, the commission admits that the allegations contained therein are true.

V

Answering Paragraph Five of the petition, the commission denies that the orders referred to were, or that either of them was, entered and made by it for the purpose or with the design of enforcing those

provisions of section 15*a* of the interstate commerce act, as amended, relating to the recovery by and payment to the commission of excess railway operating income or the establishment or maintenance of the reserve fund mentioned in said section 15*a*. The commission admits, however, that said orders were, and that each of them was, entered and made by it as a procedural step deemed by it necessary and appropriate for the purpose of enforcing, in so far as with it lies, the provisions of said section 15*a*, and that said section was added to the interstate commerce act by the transportation act, 1920. For more full and complete information in this connection, the commission refers the court to said orders, which are Exhibits "A" and "B" to the petition.

VI

Answering Paragraph Six of the petition, the commission admits that the allegations therein contained are true, except that the commission denies that by said 1920 order it directed complainant to pay [fol. 54] to the commission one-half of the excess income mentioned not paid into the reserve fund referred to; denies that it made a definite demand for such payment; denies that by said 1921 order the commission directed complainant to pay to the commission one-half of the excess income mentioned; denies that by said 1921 order the commission directed complainant to place in a reserve fund the other one-half of said excess income, and denies that said order contained a definite demand for said payment. The commission alleges that said orders, in so far as they relate to payment to the commission, and placing in reserve funds, of excess income, are simply admonitory and intended to remind complainant of the requirements of said section 15*a*. For more full and complete information in this connection, the commission refers the court to said orders, which are Exhibits "A" and "B" to the petition.

The commission assumes that the figures "1920", contained in the first line of the first whole paragraph on page 7 of said petition were inserted through error, and that complainant intended to insert instead "1921". The commission denies that its demands upon complainant, or amounts thereof, have become, or are now, definite or fixed, as alleged in said Paragraph Six.

VII

Answering Paragraph Seven of the petition, the commission admits that the allegations therein contained are true.

VIII

Answering Paragraph Eight of the petition, the commission admits that the allegations therein contained are true.

[fol. 55]

IX

Answering Paragraph Nine of the petition, the commission disclaims information sufficient to form a belief as to whether the

allegations contained in said paragraph are, or as to whether any of said allegations is, true.

X

Answering the first subdivision of Paragraph Ten of the petition, the commission denies that it demanded that complainant pay to the commission one-half of the excess income referred to, or any other sum of money, and denies that it demanded, or that either of the orders referred to requires, that complainant set aside in a reserve fund, the other one-half of said excess, twenty-seven thousand seven hundred sixteen dollars and sixty-one cents, or any other sum of money.

Answering the second subdivision of said Paragraph Ten, the commission admits that it is in possession of the originals of the exhibits mentioned, and alleges that if complainant wishes to use, as evidence in this suit, certified copies of said exhibits, it should obtain such certified copies under and in accordance with the provisions of paragraph (13) of section 16 of the interstate commerce act, the language of which is:

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals.

[fol. 56]

XI

Answering Paragraph Eleven of the petition, the commission denies each of and all the allegations contained in said paragraph.

XII

Answering Paragraph Twelve of the petition, the commission denies that either the provisions of section 15*a* of the interstate commerce act relative to the payment of excess income to the commission and relative to the establishment and maintenance of a reserve fund, or the construction placed on said provisions by the commission, or the administrative acts of the commission pursuant to said provisions, or the orders or demands of the commission in respect of said provisions, are, or that any of them is, either null, or void, or invalid, for the reasons, or for any of the reasons, set forth in said paragraph, or for any other reason or reasons.

Answering specially subdivision (*c*) of said paragraph, the commission denies that the orders mentioned take, or that either of them takes, the property of complainant for public use; denies that by said orders, or by either of them, complainant is compelled to invest either the revenues, or the income, or the receipts, or the profits, derived from said property, or any part thereof, in any particular manner or for any particular purpose; denies that by said orders, or by either of them, complainant is either limited or restricted in the expenditure or use of said property, or revenues, or income, or receipts, or profits.

Answering specially subdivision (*d*) of said paragraph, the commission denies that the involuntary payment by complainant of the money referred to, or any other sum of money, is demanded by the [fol. 57] orders mentioned, or by either of said orders, and denies that the involuntary investment by complainant of the funds referred to, or any part of said funds, is directed in said orders, or in either of said orders.

Answering specially subdivision (*e*) of said paragraph, the commission denies that either the revenue, or the income, or the profits, referred to, arose or accrued to complainant, or was derived by it from, non-carrier sources; denies that the Congress has not the power to take from complainant any part of the rents, or revenues, or income, or profits, mentioned, and denies that any part of said rents, or revenues, or income, or profits, accrued to complainant from rentals, or leases, or trackage rights, or interest, or any sources, wholly disconnected and separated from complainant's transportation or carrier services or from the charges and receipts therefor.

XIII

Answering Paragraph Thirteen of the petition, the commission denies that all the rates, or fares, or charges, referred to, were fixed and determined by orders of the railroad commission, of the State of Texas, and by orders of the commission and denies that the commission is either precluded or estopped from denying or contesting the reasonableness of either said rates, or said fares, or said charges. The commission denies that it has made any effort to compel the payment to it by complainant of the excess earnings referred to, or of any part thereof, which is either unlawful, or unenforceable, for the reasons, or for any of the reasons, set forth in said paragraph, or for any other reason or reasons. In this connection the commission de- [fol. 58] nies that it has made an effort to compel the payment to it by complainant of said excess earnings, or of any part thereof.

Answering specially subdivision (*a*) of said paragraph, the commission denies that in proceeding Ex parte 74, the commission fixed either the rates, or fares, or tolls, or charges referred to. In this connection the commission alleges that in said proceedings it simply authorized certain increases in rates, fares, and charges which had previously been established and put in force by the interested common carriers.

Answering specially subdivision (*b*) of said paragraph, the commission disclaims information sufficient to form a belief as to whether the allegations relating to net earnings and property values are true. The commission denies that the claims referred to are, or that any of said claims is, properly chargeable in the accounts of complainant for the years 1920 and 1921, or for either of said years. In this connection the commission alleges that, under rules and regulations prescribed by the commission, complainant charges sums of money paid by it, on account of claims like those mentioned, into its account for the years, respectively, in which the payments are made, regardless of the dates upon which the claims accrue. The commission denies that, as between complainant and the commission, the general level of rates referred to must be presumed to be reasonable.

Answering specially subdivision (*c*) of said paragraph, the commission denies that, as between complainant and the commission, the commission is estopped from denying the reasonableness of either the rates, or tolls, or charges, or fares, referred to, and denies that the commission has demanded that complainant pay to it the excess earnings mentioned, or any part of said excess earnings.

Answering specially subdivision (*d*) of said paragraph, the Commission denies that it has demanded that complainant pay to it the excess earnings referred to, or any part of said excess earnings.

[fol. 59]

XIV

Answering Paragraph Fourteen of the petition, the commission denies that by its orders it has demanded that complainant pay to the commission and pay into a reserve fund the sums of money referred to; denies that by said orders, or by either of them, it has demanded either that complainant pay to the commission, or that complainant pay into a reserve fund, any sum of money, and denies that complainant will suffer irreparable injury, or suffer any injury, if the injunction prayed for by the complainant in the petition is not granted by the court.

Further answering the allegations contained in the petition, the commission alleges that said order of January 16, 1922, and said order of March 16, 1922, were, by it, duly made, and duly served upon complainant, under and in accordance with authority conferred upon the commission by the provisions of the interstate commerce act, and particularly by the provisions of section 15*a* of said act, and that said provisions are, and that each of said provisions is, constitutional and otherwise valid.

With the exception of the allegations expressly admitted herein by it, the commission denies each of and all the material allegations contained in the petition, in so far as they are, and in so far as any of them is, inconsistent, or in conflict, with the allegations and denials in this answer.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that the petition be dismissed.

Interstate Commerce Commission. (Signed) P. J. Farrell, Chief Counsel.

[fol. 60] CITY OF WASHINGTON,
District of Columbia, ss:

Balthasar H. Meyer, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named defendant, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

Balthasar H. Meyer.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia this 4th day of January, 1923. Alfred Holmead, Notary Public. (Seal.)

[fol. 61] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

AMENDED MOTION TO DISMISS PETITION—Filed Feb. 26, 1923

Amended Motion to Dismiss

United States of America and Randolph Bryant, United States Attorney for the Eastern District of Texas, defendants herein, by their counsel, now come and move the court to dismiss the Bill of Complaint at the cost of the Complainant.

As grounds for this motion it is shown:

I

The suit is not a suit to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission within the meaning of the Commerce Court Act (36 Stat. 539) and Urgent Deficiencies Act (38 Stat. 219) but is a suit to stay and suspend "orders of the Commission * * * so far as they relate to the payment of money."

II

The suit is not a suit to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission within the meaning of Commerce Court Act (36 Stat. 539) and Urgent Deficiencies Act (38 Stat. 219), but is a suit against the United States and certain of the officers thereof to enjoin it and them from enforcing the laws of the United States, for which suit no jurisdiction in equity has been conferred upon the United States District Court for the Eastern District of Texas.

[fol. 62]

III

From the face of the Bill of Complaint it appears that the Complainant has complied with, or undertaken to comply with, the two

orders of the Interstate Commerce Commission about which Complaint is made; that is to say, upon the entry and service of the order of January 16, 1922, (Exhibit A, p. 33), complainant filed with the Commission its statement in response thereto (Exhibit C, p. 43); and upon the entry and service of the order of March 16, 1922, (Exhibit B, p. 39), complainant filed with the Commission its statement in response thereto (Exhibit D, p. 47); wherefore there is now no action impending or threatened by the Commission which a court of equity may enjoin.

IV

Section 422 of the Transportation Act, 1920, provides that any carrier receiving a net railway operating income substantially and unreasonably in excess of a fair return upon the value of the railway property held for and used in the service of transportation, such excess shall be held by the carrier as trustee for, and shall pay it to the United States; and if any carrier receives for any year a net railway operating income in excess of six (6) per centum of the value of such railway property, one half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund; and the general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission.

The Complainant obviously anticipates a suit by the Commission to recover funds due and owing under the foregoing Section 422 of [fol. 63] the Transportation Act 1920, and Complainant has brought this suit to the end that Complainant prematurely may set up and have adjudicated in advance the merits of the case so anticipated.

V

The Bill of Complaint is without equity on its face and the Court may not grant the relief prayed or any part of the same.

VI

The Bill of Complaint is argumentative.

Wherefore defendants pray that their motion be sustained.

(Signed) Blackburn Esterline, Assistant to the Solicitor General. (Signed) Randolph Bryant, United States Attorney. (Signed) S. D. Bennett, Assistant United States Attorney.

[fol. 64] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

STATEMENT OF THE EVIDENCE—Filed March 24, 1923

Statement of the Evidence

On the hearing of the above numbered and entitled cause held at New Orleans, La., February 16, 1923, on Complainant's application for a preliminary injunction the following, and only the following evidence was introduced, to-wit:

1

The plaintiff offered in evidence the several exhibits attached to and made a part of the petition or bill of complaint to which reference is here made for the contents thereof.

2

The Complainant thereupon offered in evidence certain affidavits or exhibits, which, the formal parts being omitted, are as follows, to-wit:

EVIDENCE: COMPLAINANT'S EXHIBIT No. 1

Report of Value of Dayton-Goose Creek Railway Company's Property as of June 30th, 1922, to the Secretary of State of the State of Texas

Office of the Railroad Commission of Texas

In accordance with the provisions of the Revised Civil Statutes of Texas, 1911, Article 6719, the Railroad Commission of Texas finds the present value, as of June 30, 1922, of the lines of railway, property rights and franchises of the Dayton-Goose Creek Railway Com-[fol. 65] pany to be equal to the sum of Nine Hundred and Thirty-four Thousand Five Hundred and Forty-two Dollars and Forty-two Cents ($934,542.42) made up as follows:

1. Engineering	$32,101.95
2. Land for transportation purposes	79,220.02
3. Grading	56,057.68
6. Bridges, Trestles and culverts	47,985.75
8. Ties	118,092.99
9. Rails	114,377.70
10. Other track material	33,516.43
11. Ballast	113,616.75
12. Track laying and surfacing	79,178.78
13. Right of way fences	11,671.20
14. Crossings and signs	2,283.65
16. Station & Office Buildings	13,352.30
17. Roadway Buildings	14,075.98
18. Water Stations	323.64
19. Fuel Stations	241.15
20. Shops and engine houses	7,176.53
26. Telegraph and telephone lines	4,521.52
27. Signals and interlockers	19,225.24
37. Roadway machines	1,807.62
38. Roadway small tools	1,515.35
40. Revenues and operating expense, credit	4,142.39
43. Other expenditures of road	681.75
44. Shop Machinery	6,479.46
Total accounts 1 to 47, inclusive	$753,361.05
Equipment accounts 51 to 58, inclusive	71,441.49
General Expenditures accounts 71 to 77	10,112.12
Interest during construction, account 76	41,520.08
Total accounts 1 to 77	876,434.74
6% Franchise value	52,586.08
Grand total	929,020.82

It appearing that the Dayton-Goose Creek Railway Company, through its President, R. S. Sterling, has waived notice of valuation required by the terms of Article 6719, Revised Statutes of 1911, and has stated that it has no objection to the report of value upon its property by this Commission:

Therefore, it is ordered by the Railroad Commission of Texas that the above report of value be forthwith made to the Secretary of State of the State of Texas and deposited in his office, there to remain as a limitation to the issuance and registration of securities as the law provides.

[fol. 66] Railroad Commission of Texas. Allison Mayfield, Chairman. Earle B. Mayfield, Commissioner. Attest: E. R. McLean, Secretary. (Seal.)

EVIDENCE: COMPLAINANT'S EXHIBIT NO. 2

My name is A. E. Kerr; I am the Vice President and General Manager of Dayton-Goose Creek Railway Company, complainant in the above styled and numbered cause, and have been such ever since a date prior to the time when the railroad of said Company was completed and opened for operation, which occurred on or about the 15th day of May, 1918; and ever since said road was opened for operation, I have been in charge of the operating department thereof;

That by an order made and entered on or about the 10th day of November, A. D., 1922, the Railroad Commission of Texas, acting in accordance with the provisions of Article 6719 of the Revised Statutes of Texas, of 1911, found the present value, as of the 30th day of June, A. D., 1922, of the lines of railroad, property, rights and franchises of Dayton-Goose Creek Railway Company to be the sum of Nine Hundred Twenty-nine Thousand Twenty and 82/100 ($929,020.82) Dollars. In my opinion, the property of the said Dayton-Goose Creek Railway Company, held for and used in the service of transportation, on the 30th day of June, A. D., 1922, was not less than the sum so found as the value thereof by the Railroad Commission of Texas.

[fol. 67] That the additions and betterments made to the properties of said complainant, between the first day of January, 1922, and the 30th day of June, 1922, less retirements, cost, and had an actual value of Twenty-one Thousand Seven Hundred and Ninety eight and 93/100 ($21,798.93) Dollars. That the additions and betterments, less retirements, made to the properties of said carrier, during the calendar year 1921, cost and had an actual value of not exceeding Fifty-nine Thousand Two Hundred Fifty-four and 73/100 ($59,254.73) Dollars; and the additions and betterments, less retirements, made to the properties of said carrier during the calendar year 1920, cost and had an actual value of not exceeding One Hundred Two Thousand Five Hundred Ninety-Six and 72/100 ($102,596.72) Dollars;

That in my opinion, the value of the property of said complainant, held for and used in the service of transportation, as of the 31st day of December, A. D., 1921, was not less than Nine Hundred Seven Thousand Two Hundred Twenty-one and 89/100 ($907,221.89) Dollars, and as of the 31st of December, A. D., 1920, was not less than the sum of Eight Hundred Forty-seven Thousand Nine Hundred Sixty-seven and 16/100 ($847,967.16) Dollars, and as of the 31st day of December, A. D., 1919, was not less than the sum of Seven Hundred Forty-five Thousand, Three Hundred Seventy and 44/100 ($745,370.44); and, in my opinion, the fair average value of the property of said carrier, held for and used in the service of transportation during the calendar year 1920, was not less than the sum of Seven Hundred Ninety-six Thousand Six Hundred Sixty-eight and 80/100 (796,668.80) Dollars, and the fair value of the [fol. 68]property of said carrier held for and used in the service of

transportation during the calendar year 1921 was not less than the sum of Eight Hundred Seventy-seven Thousand Five Hundred Ninety-four and 52/100 ($877,594.52) Dollars.

The betterments for 1920 and 1921 were distributed throughout the year and the last two figures of value for those years were obtained by adding one-half of the year's betterments costs to the total value of the preceding December 31st.

EVIDENCE: COMPLAINANT'S EXHIBIT NO. 3

"Before me, the undersigned authority, on this date personally appeared Julius H. Parmelee, who being first duly sworn, deposes, and says upon his oath as follows:

I am at present the Director of the Bureau of Railway Economics, an organization supported by many of the principal railway companies of the United States, for the purpose of compiling and studying railroad statistics. I have been connected with this Bureau for about twelve years, and was for about two years prior to my association with the Bureau of Railway Economics, a special examiner for the Interstate Commerce Commission, and in that connection my duties led me to deal exclusively with railway accounts and railway statistics.

In Increased Rates 1920 (58 ICC 229) the Interstate Commerce Commission found that "the value of steam-railway property of the carriers subject to the act, held for and used in the service of transportation" in the Western group as defined in the Commission's report in that proceeding was $8,100,000,000. This finding of value by the Interstate Commerce Commission included the carrier prop- [fol. 69] erty of all of the railroads in the Western group reporting to the Commission, including not only what is known as Class 1 railways, being those carriers with annual operating revenues in excess of $1,000,000, but also all other railways in that group.

Neither the Interstate Commerce Commission nor the Bureau of Railway Economics normally compile summaries except for railways of Class I as defined above, because in a study of the statistics of all carriers for the years 1915 and 1916 it was found that the net railway operating income of Class I roads in the Western group represented 98.36 per cent of the total of all carriers in that group, and the number of carriers other than Class I roads reporting to the Commission is so great that neither the Commission nor the Bureau of Railway Economics has deemed it profitable to compile complete statistics concerning these secondary roads. The consequence is that the net railway operating income of all of the carriers in the Western group for recent years has not been made available by compilation of the reports made by all of these individual carriers, but at page XLII of the Interstate Commerce Commission's Statistics of Railways for 1920 (Statement No. 33: Corporate income and profit and loss accounts of Class I carriers for the year ended December 31, 1920)

there are shown the corporate earnings and expense of Class I railways in the Western group for the calendar year 1920.

Inasmuch as the railways were in the possession and control of the Federal government during the first two months of the year 1920, the operating revenues, operating expenses, taxes, railway operating income, and net railway operating income shown in the [fol. 70] above mentioned statement relate to the ten months' period, March 1 to December 31 inclusive, 1920. These revenues, expenses, etc., were as follows:

10 Months, March 1 to Dec. 31, 1920

I. C. C. Statistics of Railways, 1920, *P. XLII*

Account	
1. Railway operating revenues	$2,038,612,359
2. Railway operating expenses	1,833,814,999
3. Net revenue from railway operations	234,797,369
4. Railway tax accruals	109,133,331
5. Uncollectible ry. revenues	392,572
6. Railway operating income	125,271,465
7. Hire of equipment—net balance Dr.	14,061,654
8. Joint facil. rents—net balance Dr.	9,125,455
9. Net railway operating income	102,084,357

Item 7 above is the sum of hire of freight cars—credit balance, rent from locomotives, rent from passenger-train cars, rent from floating equipment, and rent from work equipment, minus the sum of hire of freight cars-debit balance, rent for locomotives, rent for passenger-train cars, rent for fl-ating equipment, and rent for work equipment. Item 8 is the difference between joint facility rent income and joint facility rents. Item 9 is Item 6 above, minus Items 7 and 8 above. The result thus obtained is net railway operating income as defined in paragraph 1 of section 15*a* of the Transportation Act.

In a memorandum of the Interstate Commerce Commission dated January 12, 1922, entitled "The Seasonal Variation of Railway Operating Income," it was stated that the Class I railways in the Western group normally earn 89 per cent of their yearly net railway operating income during the last ten months of the year. Therefore, by equating the earnings for the above mentioned ten [fol. 71] months' period of 1920, it may be assumed that the Class I railways of the Western group earned during the period from March 1 to December 31, at the annual rate of $114,701,525. Upon the assumption that the net railway operating income of Class I roads in the Western group represents 98.36 per cent of the total for all carriers in that group (as assumption utilized by the Commission itself in Reduced Rates, 1922: 68 I. C. C. 693) the total net railway operating income for all of the carriers in the Western group, subject to the Interstate Commerce Act, for the ten months' period mentioned, was at an annual rate of $116,613,995. This net

income, upon the valuation found by the Commission for all of the roads in the Western group of $8,100,000,000, shows earnings of 1.44 per cent upon the valuation of the property of those carriers held for and used in the service of transportation.

In addition to the finding by the Interstate Commerce Commission of the valuation of carrier property in the Western group, its memorandum of October 23, 1922, page 5, states that the net additions to Class I carrier property in the Western group made during 1920 amounted to $212,515,238, thus giving an estimated value of all steam roads in the western group on January 1, 1921, as not less than $8,312,515,238.

The Interstate Commerce Commission's Statistics of Common Carriers for 1921, page 8, states that the earnings of Class I roads in the Western group for the twelve months ended December 31, 1921, were as follows:

12 Months, Jan. 1 to Dec. 31, 1921

I. C. C. Statistics of Common Carriers, 1921, *P.* 8

Account	
1. Railway operating revenues	$2,178,605,294
2. Railway operating expenses	1,739,860,450
3. Net revenue from railway operations	438,744,844
4. Railway tax accruals	126,428,571
5. Uncollectible ry. revenues	871,090
6. Railway operating income	311,445,183
7. Hire of equipment—net balance Dr.	22,545,231
8. Jt. facility rents—net balance Dr.	10,425,111
9. Net railway operating income	278,474,841

[fol. 72] Equating the net earnings of Class I roads by the formula previously described, using 98.36 per cent of the total as representing the earnings of Class I roads, we find that the total net railway operating income for all roads in the Western group for the calendar year 1921 was $283,117,976. This gives a rate of return of 3.41 per cent upon a property valuation, as above set forth, of $8,312,515,238.

The statistics set out above, including the valuation found by the Commission, the net railway operating income, and the rate of return for the two periods mentioned above, that is to say, the last ten months of 1920 and the calendar year 1921 may be summarized as follows:

	10 months, Mar. 1 to Dec. 31, 1920 (annual basis)	12 months, Jan. 1 to Dec. 31, 1921
Tentative valuation	$8,100,000,000	$8,312,515,238
Net Railway oper. income	116,613,995	283,117,976
Rate earned on tentative valuation—annual basis	1.44%	3.41%

While the railroads of the United States do not concur except perhaps in a few instances in the valuation of carrier property stated by the Interstate Commerce Commission in the report which it made in the proceeding above referred to (58 I. C. C. 229), and while the principal railways of the United States contend that the valuation of their property is substantially larger than that stated by the Commission in this report, nevertheless, for purposes of conservative statement I have regarded it as proper in this connection to [fol. 73] use the figures arrived at and found by the Interstate Commerce Commission, because the book value of the railroads of the United States, and the book value of the roads in the Western group is considerably in excess of the findings so made by the Commission, and would, therefore, indicate if used, a smaller rate of return that that which is arrived at by using the figures of the Commission.

So far as the revenue and expense accounts of the carriers are concerned for the twenty-two months above referred to, they are not only compiled by the Interstate Commerce Commission, but are also compiled by the Bureau of Railway Economics from duplicate reports sent to it, and therefore scrutinized under my supervision by the Bureau of Railway Economics, and it is therefore my opinion that the revenue, expense and income accounts of the Class I roads in the Western group given above are correct.

It is obvious that the results stated above of the study of the net income of Class I roads as compared with the net income of all roads for the years 1915 and 1916 would probably not be precisely accurate in any other year or years, but it is my opinion, and I assume from the fact that the Interstate Commerce Commission does not compile complete statistics for all roads, that it must also be of the opinion, that the results arrived at by using this equation figure of 98.36 per cent are substantially correct, and that in figuring the net rate of return as I have given it above, any error which might exist would be so small as to be entirely negligible for practical purposes. The same thing may be said of the statement that the Class I roads in the Western group normally earn 89 per cent of their yearly income during the last ten months of the year. This figure may be [fol. 74] slightly excessive in some years and somewhat too low in other years, but in view of the fact that its use has led to a rate of return for the ten months' period ending December 31, 1920, of 1.44 per cent and 3.41 per cent for the calendar year 1921, any error which might exist in this assumption would not materially change that rate of return.

Based upon the studies which I have made of railway earnings in the Western group for the periods above mentioned, that is, (*a*) March 1, 1920 to December 31, 1920, inclusive, and (*b*) the calendar year 1921, it is my opinion that the net railway operating income of all steam railroads in the Western group, as defined by the Interstate Commerce Commission in its aforesaid report, was not in excess of 1.44 per cent upon the valuation of their property held for and used in the service of transportation during the last ten months

of 1920, and was not in excess of 3.41 per cent upon the valuation of their said property in the calendar year 1921.

EVIDENCE: COMPLAINANT'S EXHIBIT NO. 4

"My name is J. J. Balderach. I reside in the town of Dayton, Liberty County, Texas. I am one of the Vice-Presidents and the Treasurer of Dayton-Goose Creek Railway Company, Complainant in the above styled and numbered cause. I am also the head of the Accounting Department of said carrier and all of its accounts are kept under my immediate supervision.

I have carefully read the petition of said company filed in this cause on the 6th day of December, 1922.

As alleged in Paragraph Nine of said Petition the reports of Dayton-Goose Creek Railway Company, copies of which are attached to said petition as Exhibit "C" and Exhibit "D," directly reflected the [fol. 75] receipts, expenses, earnings, income, assets, properties, property costs and book value, according to the rules and requirements of the Interstate Commerce Commission, and that by said reports said company duly reported to the Commission all the facts called for in each of said respective orders in accordance with the rules prescribed in said orders and in accordance with the books, records and accounts of said Company for the respective periods covered by said reports as of the dates of said respective reports and as kept in accordance with the accounting rules of the Interstate Commerce Commission.

That in my opinion the value of the property of said Company devoted to the service of transportation, as shown upon said reports, respectively, does not represent the true value of such property as of the periods covered by said respective reports, which true value, in the opinion of affiant, is substantially in excess of any value shown in either of said reports. That both of said reports were compiled, checked and verified by affiant and that in making said reports affiant used the values shown therein because he understood the rules of the Commission contained in the orders referred to in said petition to compel said Company to use and set up the value of said property from its books and accounts.

Affiant further says that said reports do not and will not in the future directly reflect the actual receipts, expenses and income properly and equitably attributable to said respective periods of time, as is more fully alleged in sub-division (*b*) of Paragraph Thirteen of said petition. In this connection Affiant further swears that on or about the 15th day of November, A. D., 1920, a shipment of rice bags consigned by Mente & Company to their own order, notify Old [fol. 76] River Company at Mont Belvieu, Texas, was delivered to Dayton-Goose Creek Railway Company at Dayton, Texas, having originated in the State of Arkansas on the line of road of St. Louis-Southwestern Railway Company, the said Dayton-Goose Creek Rail-

way Company being shown in the billing as the delivering carrier. That by mistake and error the Agent of the Dayton-Goose Creek Railway Company, on or about the 15th day of November, 1920, delivered said carload of bags to the said Old River Company without requiring the surrender of the original negotiable bill of lading. That the said Old River Company, a corporation, though frequently requested has heretofore failed and still fails to produce and surrender to Dayton-Goose Creek Railway Company said original bill of lading, which, according to affiant's best information and belief, was attached to a draft drawn by the said Mente & Company of New Orleans, La., upon the said Old River Company for the sum of, to wit: $8,702.00; that thereafter the said Mente & Company instituted suit in the Parish of Bossier, State of Louisiana, against the said St. Louis-Southwestern Railway Company as the initial carrier of said interstate shipment of rice bags for the amount of said draft, which was the amount for which said bags had been sold by the said Mente & Company to the said Old River Company. At the time of said erroneous delivery of said bags to the said Old River Company the same had a reasonable market *b*alue, at said time and place, in excess of $2,500.00; that said suit is still pending in the District Court of Bossier Parish, La., and that the only question in said suit, so far as affiant knows, relates to the proper measure of damages, plaintiff claiming the contract price of said bags, to-wit: $8,702.00, and the defendant contending for a liability not in excess of the market value of said bags at the time and place of said erroneous [fol. 77] delivery, which, according to affiant's best information and belief, was considerably less than the amount sued for, but nevertheless in excess of $2,500.00. That Dayton-Goose Creek Railway Company will be obliged, whenever said suit is finally determined, to pay to the defendant therein the amount of judgment rendered against it in said cause, which affiant believes will be in excess of $2,500.00. That the said Old River Company is now and has been for some time last past hopelessly insolvent and according to affiant's best information and belief will never be able to pay more than a small percentage of its outstanding obligations. Therefore, on account of said erroneous delivery occurring on or about the 15th day of November, 1920, Dayton-Goose Creek Railway Company incurred a liability for which it has no recourse in full against any person, firm or corporation, the agent who made said erroneous delivery being wholly unable to pay the amount of such liability and that such sum as Dayton-Goose Creek Railway Company may ultimately be obliged to pay on account of said erroneous delivery actually arose and accrued during the month of November, 1920.

That there is now pending before the Interstate Commerce Commission, Docket No. 14122, a complaint by Lubrite Refining Company against Dayton-Goose Creek Railway Company and other carriers by railroad, in which reparation is sought to be recovered on account of the assessment and collection upon certain shipments of crude petroleum oil from Goose Creek, Texas, to East St. Louis, Ill., which moved on various dates between the first day of March, 1920,

and the 31st day of December, 1921, on rates which complainant alleges to have been unjust, unreasonable, unlawful and excessive. The testimony in said cause has been heard by an Examiner of the [fol. 78] Interstate Commerce Commission and briefs have been filed therein, but, so far as affiant knows, said cause has not been decided by said Commission. That the charges upon some of said shipments involved in said proceeding were assessed and collected during the calendar year 1920, subsequent to the first day of March of that year, and others during the calendar year 1921. That if the Commission should award, and carriers should be held liable to pay, reparation for the assessment and collection of said rates and charges, Dayton-Goose Creek Railway Company will be obliged to pay a portion of said reparation, the amount of which affiant can not, of course, determine at this time, but if the Commission should award it, and the carriers should be adjudged to pay the reparation upon the basis claimed by the petitioner in said proceeding the Dayton-Goose Creek Railway Company, according to affiant's best judgment and belief, will be obliged to pay approximately $1,200.00 on that account.

Affiant has carefully checked the records and accounts of Dayton-Goose Creek Railway Company to determine the amount of its railway operating revenues derived from the conduct of intrastate transportation wholly within the State of Texas, as compared with such revenues arising from the conduct of interstate and foreign transportation during the periods covered by the respective reports referred to in said petition. The gross freight revenues of said company, derived from interstate and foreign business during the period commencing March 1, 1920 and ending December 31, 1920, was $119,597.83; that the intrastate freight revenues of said Company for the same period were $178,289.32, as shown by the statements attached hereto marked Exhibit "A" and Exhibit "B," respectively. [fol. 79] That the interstate and foreign freight revenue of said company for the calendar year 1921 were $109,190.30 and the intrastate freight revenue of said Company during the same year was $238,861.50, as shown by the statements hereto attached, marked Exhibits "C" and "D" respectively. That the passenger revenue of said Company for said respective periods was as follows:

Last ten months of 1920	$8,582.94
Calendar Year 1921	10,213.64

That all of said passenger revenue was derived from the conduct of purely intrastate business within the State of Texas, said Company having had during the period involved in this suit no arrangement whatever for through travel or through tickets with any other line of railroad, and every passenger upon the train of said Company being required to pay local fare or purchase local tickets over its line. That, therefore, the freight and passenger revenue of said Company for the last ten months of 1920 and the calendar year 1921, intrastate, as compared with interstate and foreign, was as follows:

	Intrastate	Interstate
Last ten months, 1920	$186,872.26	$119,597.83
Year, 1921	249,075.14	109,190.30
Total	$435,947.40	$228,788.13

From the foregoing it will appear that the receipts of the Dayton-Goose Creek Railway Company from the conduct of purely intrastate business, freight and passenger, was for the last ten months of 1920, 60.97% of the total receipts from intrastate, interstate and foreign traffic, and was for the year, 1921, 69.52% of the same; and considering said two periods as a whole the intrastate receipts amounted to 65.58% of the total receipts for the period commencing March 1, 1920, and ending December 31, 1921.

[fol. 80] EXHIBIT "A"

Dayton-Goose Creek Railway Company

Statement of Interstate Freight Traffic Movement and Revenue Thereon Period March 1, 1920, to December 31, 1920, Inclusive

	No. car loads, 1920	Tons, 1920	Revenue
Prods. of Agri.:			
Hay	16	192	338.98
Mill Prods	9	257	517.88
Oats	4	124	282.60
Potatoes	1	12	28.80
Total	30	585	1,168.26
Prods. of Animals:			
None.			
Prods. of Mines:			
Coke	3	116	167.28
Gravel	146	3,531	11,901.04
Coal	8	331	400.83
Crude Oil	920	34,797	26,127.63
Oth. Prods. of Mines	3	102	486.21
Total	1,080	36,677	39,102.99
Prods. of Forests:			
Lumber	72	2,066	4,504.42
Ties	16	395	492.12
Total	88	2,461	4,996.54

Manufacturers:	No. car loads, 1920	Tons, 1920	Revenue
Pipe	568	18,862	42,715.82
Mchy	33	601	1,802.45
Other Mfgs	160	3,254	11,172.30
Cement	3	106	303.00
Brick	103	4,092	6,804.30
Gasoline	21	538	2,199.95
H. H. Goods	5	42	98.53
Sewer Pipe	4	57	91.50
Wagons	3	28	158.10
Rails	1	11	D.H.
Molasses	1	15	37.19
Chemicals	17	621	2,252.12
Other Metals	3	98	296.85
Textiles	2	21	82.99
Vegetable Oils	1	17	53.30
Total	925	28,353	68,068.39
Merchandise L. C. L.	....	1,040	6,261.65
Total	2,123	71,316	$119,597.83

Dayton, Texas, December 15, 1922.

(Signed) J. J. Balderach, Vice President & Treasurer.

[fol. 81]

EXHIBIT "B"

Dayton-Goose Creek Railway Company

Statement of Intrastate Freight Traffic Movement and Revenue Thereon Period March 1, 1920, to December 31, 1920, Inclusive

Prods. of Agri.:	No. car loads, 1920	Tons, 1920	Revenue
Rice	121	3,719	5,640.21
Hay	59	653	1,483.19
Mill Prods	97	1,943	3,784.07
Oats	65	2,338	2,418.50
Flour and Meal	7	142	352.24
Fresh Fruits	13	167	326.98
Cotton Seed	....	.....	*5.50
Corn	4	89	161.46
Potatoes	1	13	21.84
Total	357	9,064	14,182.99

	No. car loads, 1920	Tons, 1920	Revenue
Prods. of Animals:			
Cattle	28	323	432.91
Hogs	1	8	25.50
Total	29	331	458.41
Prods. of Mines:			
Gravel	791	36,103	16,150.96
Coal	2	55	87.71
Asphalt	1	37	33.89
Crude Oil	586	12,462	24,235.22
Total	1,380	48,657	40,507.78
Prods. of Forests:			
Lumber	457	13,239	25,750.81
Ties	16	308	417.00
Wood	108	3,187	2,644.73
Total	580	16,734	28,812.54
Manufactures:			
Pipe	292	7,768	25,264.52
Mchy	27	531	1.869.33
Other Mfgs	157	3,606	8,188.62
Cement	77	2,872	4,481.93
Brick	73	2,959	2,832.15
Gasoline	475	13,617	32,880.63
H. H. Goods	28	250	462.93
Ice	177	3,640	5,665.31
Sewer Pipe	34	505	393.87
Wagons	3	34	202.01
Canned Goods	1	6	29.01
Lime	6	168	190.89
Molasses	2	25	87.82
Chemicals	19	873	1,441.13
Furniture	1	12	56.88
Total	1,372	36,866	84,046.97
Merchandise L. C. L.	....	1,819	10,280.63
Total	3,718	113,471	$176,289.32

Dayton, Texas, December 15, 1923.

(Sgd.) J. J. Balderach, Vice President and Treasurer.

[fol. 82] EXHIBIT "C"

Dayton-Goose Creek Railway Company

Statement of Interstate Freight Traffic Movement and Revenue Thereon Period January 1, 1921, to December 31, 1921, Inclusive

	No. car loads, 1921	Tons, 1921	Revenue
Prods. of Agri.:			
Hay	17	197	427.45
Mill Prod	6	138	398.41
Oats	6	169	366.72
Total	29	504	1,192.58
Prods. of Animals:			
Oth. Prod. of Animals	2	33	130.20
Prods. of Mines:			
Crude Oil	486	18,361	18,742.24
Gravel	26	682	2,184.76
Asphalt	2	71	171.11
Coal	8	353	204.62
Total	532	19,467	21,302.73
Prods. of Forests:			
Lumber	58	1,899	3,333.78
Wood	5	127	389.41
Ties	1	33	80.04
Total	64	2,059	3,803.23
Manufactures:			
Gasoline	635	19,222	25,346.06
Lub. Oil	657	10,936	24,537.28
H. H. Goods	3	28	104.03
Other Mfgs	172	3,033	9,513.47
Pipe	173	6,685	12,393.42
Mchy	13	264	898.75
Chemicals	47	1,979	4,644.53
Cement	2	40	45.42
Brick	....	.....	*.06
Rails	2	51	84.33
Sewer Pipe	2	28	56.33
Other Metal	1	6	32.91
Lead	1	22	96.30
Total	1,708	49,294	77,752.79

	No. car loads, 1921	Tons, 1921	Revenue
Merchandise L. C. L.....	....	897	5,008.77
Total	2,335	72,254	109,190.30

Dayton, Texas, December 15, 1922.

(Signed) J. J. Balderach, Vice President & Treasurer.

[fol. 83]

Statement of Intrastate Freight Traffic Movement and Revenue Thereon Period January 1, 1921, to December 31, 1921, Inclusive

	No. car loads, 1921	Tons, 1921	Revenue
Prods. of Agri.:			
Rice	111	3,364	5,744.03
Hay	48	566	1,360.65
Mill Prods.....	131	2,532	5,947.61
Flour & Meal.....	7	160	394.61
Fresh Fruits.....	6	85	138.74
Cotton Seed.....	5	88	207.64
Oats	18	392	715.36
	326	7,187	14,508.54
Prods. of Animals:			
Cattle	54	498	650.74
Horses	1	12	25.30
Hogs	2	17	38.63
Total	57	527	714.67
Prods. of Mines:			
Crude Oil.....	1,448	51,703	68,324.61
Gravel	213	10,069	6,024.33
Asphalt	2	38	131.16
Coal	....	.....	*20.58
Total	1,663	61,810	74,459.52
Prods. of Forests:			
Lumber	519	10,997	22,125.65
Wood	14	460	349.54
Ties	20	563	1,171.60
	563	12,020	23,647.09

Manufactures:	No. car loads, 1921	Tons, 1921	Revenue
Gasoline	1,120	30,359	69,346.90
Lub. Oil	101	1,795	4,539.99
Fuel Oil	10	387	501.89
Kerosene	4	140	163.15
H. H. Goods	12	120	299.67
Other Mfgs	139	1,900	6,695.26
Ice	92	1,910	2,882.33
Pipe	126	3,775	12,748.94
Mchy	42	905	4,226.46
Chemicals	111	5,237	8,562.21
Cement	52	2,228	4,000.13
Brick	49	1,795	2,196.27
Wagons	2	24	112.56
Rails	5	175	360.85
Sewer Pipe	6	85	177.43
Lime	....	.....	12.84
Canned Goods	....	.....	27.62
Molasses	1	18	71.09
Total	1,872	50,853	116,925.49
Merchandise L. C. L.	....	1,325	8,606.19
Total	4,471	133,722	238,861.50

Dayton, Texas, December 15, 1922.

(Signed) J. J. Balderach, Vice President & Treasurer.

[fol. 84] EVIDENCE: COMPLAINANT'S EXHIBIT NO. 5

"My name is J. A. Brown. I reside in the City of Houston, Harris County, Texas. At the present time I am the General Freight Agent of Gulf Coast Lines, a system of railroads comprising New Orleans, Texas & Mexico Railway Company, which operates a line of railroad from the City of New Orleans, La., to the Texas-Louisiana state line, at a connection with the rails of The Beaumont, Sour Lake & Western Railway Company at the Sabine River; The Beaumont, Sour Lake & Western Railway Company, which operates a line of railroad from the aforesaid connection with the rails of New Orleans, Texas & Mexico Railway Company at the Sabine River, to the City of Houston, Harris County, Texas; The St. Louis, Brownsville & Mexico Railway Company, which operates a line of railroad from the said City of Houston to the City of Brownsville, Cameron County, Texas, on the Mexican border, where by means of the tracks and bridge of the Brownsville & Matamoras Bridge Company, it connects

with the rails of the National Railways of Mexico; the Orange & Northwestern Railroad Company, which operates a line of railroad from the City of Orange, Orange County, Texas, to the City of Newton, Newton County, Texas, crossing the line of The Beaumont, Sour Lake & Western Railway Company at Mauriceville, Texas.

These railroads were formerly parts of the so-called Frisco System and ever since a date prior to the year 1910 have been operated under a common management and control as parts of the same system. Except for a short time during the period of Federal Control of Railroads, my connection with these lines as General Freight Agent has been continuous for more than ten years, during all of which time I have been the head of the Traffic Department of these lines. [fol. 85] When the St. Louis-San Francisco Railroad Company went into the hands of receivers in 1913, the lines above mentioned also went into the hands of a receiver, but were reorganized, effective March 1, 1916, into a separate and independent system of railroads, and since that time have been known commercially as the Gulf Coast Lines. The system also includes some other small lines which it is not deemed necessary to mention. The operated mileage of the St. Louis, Brownsville & Mexico Railway Company, which lies wholly within the State of Texas, was on December 31, 1921, 544.99 miles. The operated mileage of The Beaumont, Sour Lake & Western Railway Company, which lies wholly within the State of Texas, was on said date 112.33 miles, and the operated mileage of The Orange & Northwestern Railroad Company, which also lies wholly within the State of Texas, was on said date 61.55 miles. For the ten years immediately preceding the date last mentioned, no substantial change occurred in the operating mileage above mentioned.

On account of my connection with the Traffic Department of the lines mentioned above, I have for more than ten years last past been engaged in studying and participating in rate adjustments into and out of the State of Texas and intrastate within the state of Texas. During the past year or eighteen months the owners of the Gulf Coast Lines began negotiations with the owner of the stock of the Dayton-Goose Creek Railway Company looking to the purchase of all of the capital stock of Dayton-Goose Creek Railway Company by New Orleans, Texas & Mexico Railway Company, one of the companies composing the Gulf Coast Lines, and at the request of the [fol. 86] Executive Department of New Orleans, Texas & Mexico Railway Company I made an investigation of the traffic and rate situation of Dayton-Goose Creek Railway Company in order to ascertain as nearly as I could, for the benefit of the New Orleans, Texas & Mexico Railway Company, its officers and directors, the status of the traffic affairs of Dayton-Goose Creek Railway Company, its possibilities from a traffic standpoint, and its potential earning capacity; and by reason of having made this investigation and of my connection during the past ten years and more with rate adjustments generally within and into and from the State of Texas, it is my opinion that I am at least reasonably well acquainted with the traffic and rate situation of Dayton-Goose Creek Railway Company.

The railway operating revenues of Dayton-Goose Creek Railway

Company from March 1, 1920, to December 31, 1921, were, of course, derived from services and transportation rendered and conducted either wholly intrastate within the State of Texas or interstate and foreign between points within the State of Texas and points without the State of Texas.

So far as the Railway operating revenues of said company were derived from intrastate transportation conducted wholly within the State of Texas, they were based upon rates established, promulgated or approved either by the Railroad Commission of Texas or by the Interstate Commerce Commission, as evidenced by the following statement. Prior to the orders of the Interstate Commerce Commission in the case of Railroad Commission of Louisiana vs. Aransas Harbor Terminal Railway Company, et al., 48 I. C. C., 312, and Railroad Commission of Louisiana vs. St. Louis-Southwestern Railway Company, et al., 23 I. C. C., 31, 34 I. C. C., 472, commonly referred to as the Shreveport Case, the order in connection with the [fol. 87] report published in 48 I. C. C., 321, being dated January 22, 1918, all of the transportation conducted intrastate in the State of Texas was conducted at rates established and promulgated by the Railroad Commission of Texas. In its said order of January 22, 1918, Docket No. 8418, the Interstate Commerce Commission prescribed or approved rates upon all classes and commodities, except a few commodities to be below mentioned, for application to intrastate traffic by railroad within the State of Texas. Rates upon the few commodities excepted from the order of the Interstate Commerce Commission in said proceeding has been agreed upon between the complainant, the carriers, representative shippers and the Railroad Commission of Texas and were promulgated by an order or orders of the Railroad Commission of Texas, and were for that reason excepted from the order of the Interstate Commerce Commission. Effective June 25, 1918, a general increase in rates, including all rates applicable to intrastate traffic in Texas, became effective by order of the Director General of Railroads of the United States, averaging approximately 25%, and later the intrastate rates within the State of Texas were further increased by approximately 35% under the order of the Interstate Commerce Commission in Ex Parte 74, Increased Rates 1920, 58 I. C. C., 220, the order in the proceeding last mentioned being dated July 29, 1920, and took effect on August 26, 1920.

Application was promptly made after the decision of the Interstate Commerce Commission in the proceeding last mentioned to the Railroad Commission of Texas for an express order authorizing the increase of the intrastate rates within the State of Texas to the level approved and directed by the Interstate Commerce Commission in said proceeding. This order was refused by the Railroad Commission of Texas which authorized an increase of 33⅓% instead of the 35% authorized by the Interstate Commerce Commission. The [fol. 88] Texas carriers thereupon increased the classes and commodities involved in the above mentioned Shreveport case 35% but only advanced the rates on those commodities which had been excluded from the order in the Shreveport case 33⅓%. All of the

foregoing has reference to freight rates. Up to the time of the decision by the Interstate Commerce Commission in Ex Parte 74, the passenger rates in Texas had, except in a few instances relating to party and excursion rates and the like, been 3¢ per mile as fixed by Article 6618 of the Revised Statutes of Texas of 1911. The said order of the Interstate Commerce Commission authorized and approved an increase of passenger rates in the State of Texas to 3.6¢ per mile and also authorized a surcharge, to be collected from passengers riding in sleeping, parlor or chair cars equal to 50% of the sleeping car fare, parlor car fare or chair car fare. The application of the Texas carriers to the Railroad Commission of Texas, next above referred to, also requested authority to increase the passenger rates to the levels just mentioned and this part of the application was also refused by the Railroad Commission of Texas.

Thereupon the principal Texas carriers instituted a proceeding before the Interstate Commerce Commission, No. 11764 upon the Docket of said Commission, charging that the failure of the Railroad Commission of Texas to authorize the same increases in intrastate rates in Texas as had been authorized by the Interstate Commerce Commission in Ex Parte 74, and the resulting discrepancy in the rates intrastate as compared to interstate, constituted a discrimination against interstate commerce which the Interstate Com- [fol. 89] merce Commission was requested to order removed. On February 12, 1921, the Interstate Commerce Commission issued its report and order in said proceeding, 60 I. C. C., 421, finding that the discrimination charged did in fact exist and directing its removal and prescribing the same rates, fares and charges for application to intrastate traffic and travel in Texas as had been authorized for the group in which said state is located in Ex Parte 74, and the rates, fares and charges so prescribed, except in some minor and negligible instances, where expressly authorized by the Interstate Commerce Commission, continued to be charged upon intrastate freight and passenger traffic in Texas during the remainder of the year 1921. The revenue derived by Dayton-Goose Creek Railway Company between March 1, 1920, and December 31, 1921, from interstate and foreign traffic was derived and earned on account of the transportation of traffic which, for the purposes of this affidavit, may be divided into two classes: (*a*) traffic upon which rates had been prescribed or approved by express orders of the Interstate Commerce Commission. All interstate traffic covered by the orders of the Interstate Commerce Commission in the Shreveport Case cited above, and all interstate traffic upon which the Interstate Commerce Commission had fixed rates in specific complaints are instances of this class of traffic. (*b*) Traffic which moved upon rates, the basis of which have been in existence for many years without substantial and successful attack. The basis of the greater part of these rates had been in effect to and from points in Texas for many years and in my opinion these rates, taken as a whole, were reasonable. This opinion of mine is based not only upon my traffic experience in connection with those rates but also upon the presumption that rates which have been in existence during a long period of time are presumptively reasonable.

[fol. 90] See Galble-Robinson Commission Co. vs. St. L.-S. F. R. R. Co., et al., 19 I. C. C., 114, Commercial Club of Omaha vs. Southern Pacific Company, et al., 20 I. C. C., 631.

My opinion therefore is that aside from such errors, if any, as may have arisen in the ordinary course of business, the gross railway operating revenues of Dayton-Goose Creek Railway Company for the period commencing March 1, 1920, and ending December 31, 1921, arose from the assessment and collection of rates, fares and charges, which, on the whole, were just, fair and reasonable and were not unlawful, unreasonable or excessive.

OFFERS IN EVIDENCE

The Interstate Commerce Commission offered in evidence the following matters, viz:

(1) Certified copy of excerpts from Special Instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(2) Certified copy of excerpts from General Instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(3) Certified copy of excerpts from order of the Commission, dated April 26, 1921, and effective on and after January 1, 1921, in a proceeding, entitled, "In the matter of a uniform system of accounts to be kept by steam roads."

(4) Order, Ex parte 74, July 29, 1920 (58 I. C. C. 220).

Copies of the foregoing accompany this statement as a part hereof. [fol. 91] And Complainant prays that the foregoing statement of the evidence in this cause be approved and made a part of the record herein on appeal.

Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Complainant and Appellant.

No objection having been made to the foregoing statement of the evidence, the same is hereby approved, on this the 6th day of April, 1923.

R. W. Walker, Circuit Judge. Alex C. King, Circuit Judge. Rufus E. Foster, District Judge.

The foregoing statement of the evidence is hereby approved and agreed to.

Blackburn Esterline, Assistant to Solicitor General for the United States of America; Randolph Bryant, District Attorney; P. J. Farrell, Chief Counsel Interstate Commerce Commission, for the Commission.

[fol. 92] EVIDENCE: ORDER

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 29th Day of July, A. D. 1920.

Ex Parte 74

In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates.

It appearing, That by its report entered in the above-entitled proceeding, which is hereby referred to and made a part hereof, the Commission authorized certain increases in the rates, fares, and charges of railroads within the continental United States;

It is ordered, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates, fares, and charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the increases herein authorized to be applied to the rates, fares, and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all other respects said orders shall remain in full force and effect.

It is further ordered, That all tariffs or supplements changing rates now maintained or held by virtue of outstanding orders of this Commission shall bear on their title-page the following:

Rates shown in this supplement (or tariffs supplemented hereby) published under authority of outstanding orders of the Interstate Commerce Commission are increased herein under authority of order of the Interstate Commerce Commission docket No. 74 (Ex Parte), dated July 29, 1920.

[fol. 93] And it is further ordered, That a copy of this order be served on each carrier party to said orders and that a copy thereof be inserted in the docket in each such proceeding.

By the Commission.

George B. McGinty, Secretary. (Seal)

(1) Certified copy of excerpts from Special Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914, as follows, viz:

Accounts for Operating Revenues.—The accounts provided for operating revenues are designed to show amounts of money which a carrier becomes entitled to receive from transportation and from operations incident thereto.

Credits to the revenue accounts shall as nearly as practicable be upon the basis of accruals of revenue.

No charge shall be made against the accounts of this classification for amounts representing tariff charges which for any cause are uncollected, the service for which the charge is made having been prop-

erly performed and individuals or companies being liable for the charges. (Id. 13.)

Accounts for Operating Expenses.—The accounts prescribed for operating expenses are designed to show expenses of furnishing transportation service, including the expenses of maintaining the plant used in the service. The accounting shall be as nearly as practicable upon the basis of accruals; however, the option is allowed the carrier of omitting charges to the accounts provided for the depreciation of fixed improvements and of including the depreciation (ledger value less salvage) of such property in the appropriate repair accounts at the time the property is converted or retired for replacement. (Id. 31.)

[fol. 94] Balances in Operating Reserves.—If, at the end of a fiscal year, balances remain in operating reserves, the carrier shall indicate in detail in a formal report to the Commission the amounts therein, and the conditions causing the carrying forward of such balances, except as to balances applicable to personal injury or loss and damage liability, for which balances the carrier shall preserve in its files the details upon which such estimates were based. Separate records shall be kept of the operating reserve accounts for each year.

Interpretation of Item Lists.—Lists of "items," "details," etc., have been given as a part of this classification for the purpose of clearly indicating the application of the accounting rules in specific cases. The lists in every case are to be considered as merely representative and not as excluding from any account analogous items which happen to be omitted from the list appended. * * * (Id. 38.)

(2) Certified copy of excerpts from General Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914, as follows, viz:

"Unaudited Items Affecting Operating Accounts.—When for any cause the amount of any item affecting operating revenues or operating expenses can not be accurately determined in time for inclusion in the accounts of the month in which the transaction occurs, the amount of the item shall be estimated and in such form charged or credited to operating accounts and credited to balance-sheet account No. 78, "Other unadjusted credits," or charged to balance-sheet account No. 727, "Other unadjusted debits," as may be appropriate, the necessary adjustments being made later when the item is audited. The carrier is not required to anticipate minor items which would not appreciably affect the operating accounts. (Id. 10.)

(3) Certified copy of excerpts from order of the Commission, dated April 26, 1921, and effective on and after January 1, 1921, in a proceeding entitled, "in the matter of a uniform system of accounts to be kept by steam roads," as follows:

* * * If, on account of claims for personal injury or loss and damage being unsettled at the close of the year, the accounts for such expenses are not adjusted, the balances carried forward in the operat-

ing reserve account shall be analyzed as provided for in section 20 of these instructions.

Charges for stationery and printing and for advertising for a fiscal year shall be adjusted to the actual expenses.

[fol. 95] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

OPINION OF THE COURT—Filed Mar. 16, 1923

On Application of Complainant for Preliminary Injunction and on Motion of the United States to Dismiss the Petition

Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Andres, Streetman, Logue & Mobley, for Complainant.

Blackburn Esterline, Assistant to the Solicitor General, Randolph Bryant, United States Attorney, and S. D. Bennett, Assistant United States Attorney, for Defendants.

Before Walker and King, Circuit Judges, and Foster, District Judge

By the COURT:

Dayton-Goose Creek Railway Company, a corporation organized and existing under the laws of Texas, filed its bill in equity against the United States of America, the Interstate Commerce Commission, (herein called the Commission), and the United States District Attorney for the Eastern District of Texas, the District in which complainant has its principal office and principal operating [fol. 96] office. The bill contained allegations to the following effect: Complainant is now and has been since a date long prior to the 29th day of February, 1920, a common carrier by railroad engaged in the transportation of freight and passengers, for hire, in intrastate, interstate and foreign commerce, and as such is now and was at all times mentioned in the bill subject to the Act of Congress entitled "An Act to Regulate Commerce, and for other purposes," approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, and also subject to the lawful provisions of the Transportation Act of 1920, and to all other lawful Acts of Congress regulating railroads engaged in interstate and foreign commerce. Pursuant to orders of the Commission, complainant, under protest, has filed a report containing a statement of investment in road and equipment, of net railway operating income, by months, for the year ended December 31, 1920, and of excess railway operating income for the ten months of that year from March 1, 1920, to December 31, 1920. It filed a similar report covering the entire year 1921. Each of those reports showed that, for the period it

covered, complainant had a net railway operating income in excess of 6 per cent of the value of the railway property held for and used by it in the service of transportation, and stated the amount of such excess. The Commission has, by orders set out, required one-half of such excess to be placed by complainant in a reserve fund, and demanded of the complainant payment by it of one-half of such excess, and has fixed a stated date by which such demand is to be complied with. If such demands are not complied with within the time fixed, the Commission will undertake to prosecute complainant, its officers and directors, and to subject them to fines and penalties for failing to comply therewith. The bill contains a prayer [fol. 97] for a temporary injunction staying and suspending said orders of the Commission so far as they relate to the payment of money by complainant to the Commission and into a reserve fund of complainant. The case was submitted on complainant's application for a temporary injunction and on motion of the United States to dismiss the bill.

The Transportation Act of 1920 was passed by the Congress to accomplish a number of purposes.

The railroads of the country for more than two years had been taken out of the hands of their owners and operated by the Federal Government, as a single system.

This operation had ignored the competitive system formerly existing between lines of Railway and had routed the business solely with a view to its expeditious handling to meet the emergencies arising from a state of war. Business which under the former system would have been solicited and moved over certain lines, was under government control frequently routed over a formerly competitive line.

The Government was, on March 1st, 1920, restoring the operation of the railroads to their owners to re-establish their several businesses and resume their relations as carriers, by land, of the commerce of the country.

In so doing, it recognized that the years of Government operation had altered the practical relation of the railroads to the public and to governmental regulations. The Congress determined that its powers to regulate interstate commerce must now be exercised to a wider extent than before, in order that an adequate system of interstate transportation should be preserved for the commerce of the country. To that end, it greatly enlarged the powers of the Interstate Commerce Commission. It empowered it to group the railroads of the country, to prescribe rates adequate to a fair remuneration of each of the members of such groups and to order proper divisions of such joint rates. It could also prescribe minimum as [fol. 98] well as maximum rates. It could exercise such control over intrastate rates as would prevent discriminations against interstate or foreign commerce. It could control the issuance of railroad securities, the building of additional roads and the abandonment of existing lines, so far as they were interstate carriers. It could plan and recommend the consolidation of all the railroads of

the country into a number of interstate systems, not being necessarily restrained by existing competition.

The scope of this Act and the departure therein from the former limitations on the regulation of interstate commerce have been the subject of recent consideration by the Supreme Court of the United States in the case of The Akron, Canton and Youngstown Railway Company et al. v. The United States of America et al., (The New England Divisions Case), opinion rendered February 19, 1923.

In this opinion it is said:

"Transportation Act, 1920, introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563,585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation seevice. Upon the Commission, new powers were conferred and new duties were imposed." * * *

"The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit [fol. 99] to what the traffic would bear. A five per cent increase had been granted in 1914, the Five Per Cent Case, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, the Fifteen Per Cent Case, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized."

Among other provisions the Act provided substantially that all railroads should hold one-half of the excess of net earnings over 6 per cent. net on the valuation of its property as fixed by the Commission after paying expenses, as trustee, for, and pay the same to, the United States. These sums were to be collected by the Interstate Commerce Commission and used by it "in furtherance of the public interest in railway transportation, either by making loans to carriers to meet expenditures for capital account or to refund ma-

turing securities originally used for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers"; sums *to* collected and accretions thereof to constitute a revolving fund to be used for the purposes stated. Transportation Act, 1920, Sec. 422, 41 Stat. 456, 488.

This provision is attacked as unconstitutional, on the ground that it takes the property of the carrier from whom such per cent. of excess earning is collected without compensation, and denies to it due process of law, and also on the ground that the requirement, so far as it embraced any earning from intrastate rates, was beyond the power of Congress.

It is well settled that no Act of Congress will be declared unconstitutional unless the question is free from any reasonable doubt. Nichol v. Ames, 173 U. S. 509, 515.

It would not be seriously questioned that in returning the railroads to their owners, after their use during the World War, the [fol. 100] United States could have made an appropriation creating a revolving fund, and prescribed for its use in aiding railroads as is now provided in the Transportation Act of 1920.

It would be a reasonable exercise of its right to thus partly compensate for the use of their property, used in the manner above recited, during the period of government operation.

Furthermore, by the Act of June 8, 1872, all of the railroads of the country are declared to be post roads. Rev. Sts. Sec. 3964, (U. S. Comp. Sts. Sec. 7456).

By the Constitution the Congress is expressly empowered "to establish Post offices and post roads." Const., Art. I, Sec. 8, cl. 7.

Under this and other like powers the Congress has aided the construction of the transcontinental lines.

These powers would authorize aid to be extended in the manner prescribed in the Transportation Act to keep up and make efficient such railroads as needed the same.

The only question left, therefore, is as to the Government's right to raise this fund, so to be used, by requiring the railroads to pay to it one-half of the excess earned by them over certain percentages. It will be noted that no road earning any excess is relieved from this assessment.

The power of Congress to regulate interstate and foreign commerce includes power to adopt measures to aid and encourage such commerce. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204; Mobile County v. Kimball, 102 U. S. 691, 696. To promote those objects it may exercise its power of taxation. License Tax Cases, 5 Wal. 462, 470. It is not doubted that funds raised by legal taxes or exactions may be devoted to the purposes for which the revolving fund provided for is required to be used.

[fol. 101] While the exaction in question is not denominated a tax it is in effect an excise tax levied on all carriers subject to the Transportation Act, payable from surplus earnings. In other words, the carriers are exempt from this tax who do not earn a certain per cent. on their invested capital, and all are exempt up to this percent-

age of net earnings. All whose earnings exceed that amount are required to pay the same percentage of the excess to provide a given fund. In speaking of the raising of revenues for weaker lines, the Supreme Court, in The New England Divisions Case, says:

"In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

We see no reason why the United States cannot measure this tax by the excess profit realized over a specified percentage.

It is the nature of the demand and not its name as given in the statute which determines if it is in truth a tax. Helwig v. United States, 188 U. S. 605, 613; Fontenot v. Accardo, 278 Fed. 871, 874.

That this levy is made on excess profits derived from intrastate as well as from interstate traffic is not a sound objection. Regarded as a tax levied by the Government it can be measured by the entire profit of the railway as well as by a percentage on that part of the surplus net income derived from interstate business.

Where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the Nation, the measure of the tax may be the income from the property or business of the party taxed, although a part of such income is derived from property or business in itself not taxable by the Nation. Flint v. Stone Tracy Co., 220 U. S. 108, 163.

[fol. 102] The tax would be an excise tax on the business of the class of carriers named. Railroad Co. v. Collector, 100 U. S. 595,598.

So regarded, the requirement that this fund be held in trust for, and be paid to, the United States, is, as to the percentage of sums collected in excess of the percentage to be retained by the railway company, not the taking of its property without compensation or due process of law.

Indeed, this part of the income of the road is not collected by it absolutely as its property. It is earned and collected under the terms of the Transportation Act to be held in trust for, and to be paid to, the United States.

It is not contended that the part of its net revenue from its railway operations which, under the provision in question, complainant is permitted to retain is less than a fair and remunerative return on its investment in road and equipment. So far as complainant is concerned, the practical result is the same as it would have been if the rates and charges for complainant's transportation services had been so fixed as to enable it to receive for such services a compensation no greater than the amount it is permitted to retain after deducting the sums required by the Transportation Act.

But it is insisted that this provision leaves open the question that shippers may bring suits against a carrier, who makes a large income under the rates permitted, for overcharges, and that the carrier will have then disposed of this part of the overcharge to the Government.

In effect, the suggestion is that the returns made in the manner prescribed do not show complainant's real net railway operating in-

come for the periods covered, as deductions to be made from gross income do not include amounts which, after the dates of the returns, [fol. 103] complainant may be required to pay in discharging claims which accrued during such periods, which amounts may be unascertainable until afterwards.

We do not understand that that the validity of a tax or exaction based upon yearly income or an excess thereof over a stated per cent., is dependent upon it being permissible, in ascertaining such income of such excess, to deduct from the amount of gross income received during the year both what is paid during the year in discharging liabilities previously incurred and also an amount to cover liabilities incurred during the year which remain unliquidated at the end of the year and when the return is made. Where the right to claim an overcharge exists, the repayment of such overcharge would be a charge against the gross income of the year when paid, as an expense of that year, just as payments made in the year 1922 on judgments rendered against a carrier are reckoned as an expense of that year notwithstanding the claim originated in an earlier year. It is not sufficiently probable that there will be such differences in the income of succeeding years as to make it likely that this method of dealing with this subject would not average itself. What are proper deductions to be made from gross income in ascertaining net income for a given period is a matter for legislative determination.

It may well be questioned whether a claim for overcharge would be sustained where a rate approved by the Commission was charged. The carriers are not required to charge these rates; they are only permitted so to do, and it hardly lies in the mouth of a carrier to [fol. 104] suggest that the rates so charged by it will be considered unreasonable, where fixed by it within a maximum allowed by the Commission, especially where the excess over a limited per cent. is paid to the Government under a statute so requiring, or appropriated in the manner prescribed by the Transportation Act.

It is to be presumed that the rates permitted to be charged by the railroads under this Act are not unjust and unreasonable as to the shippers, where authorized by the Commission which is vested with such extensive powers as to seeing that such rates are just and reasonable and non-discriminatory as to the shippers.

It may be also questioned whether the carrier could be charged, in any event, with the percentage which had been paid therefrom to the United States under the terms of this Act.

But if the sums paid to the Government are to be regarded as overcharges paid by shippers and as money to which they are entitled, this does not give to the carrier any right to retain this sum, or to an injunction to restrain the Government from collecting the sum which the carrier is only allowed to collect as a trustee for the United States, or for special purposes prescribed by statute.

The Transportation Act provides that this fifty per cent. of the excess over 6 per cent is not collected, or held, by the carrier for its own account, but as trustee for the United States, to whom it is to be paid.

Clearly, the carrier is not entitled to retain it in the absence of any demand on it for its repayment by the persons from whom collected.

The utmost of its right, in that event, would be be to interplead the claimants. It would have no right to retain the fund as its own, which it now proposes to do. It does not concede any liability to refund this, or any other fund, to the shipper.

[fol. 105] If the carrier has no right to the fund, it cannot raise the question of the constitutionality of this part of the Transportation Act. Hatch v. Reardon, 204 U. S. 152, 160; Turpin v. Lemon, 187 U. S. 51, 60.

As to the requirement that the rail carriers subject to the Transportation Act shall devote the remaining fifty per cent. excess over said 6 per cent. to certain purposes, this does not take away any part of said fund from the carrier earning it. It only requires the carrier to hold and use it for certain of its corporate purposes.

We think that this is within the powers of the Congress to order. Wilson v. New, Receiver, 243 U. S. 332, 347.

It is not perceived what right the complainant has, in this situation, to decline to recognize its liability to the United States and make payment to the Interstate Commerce Commission, as its designated agent.

The injunction applied for will be denied and the bill dismissed.

[fol. 106] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL OF COMPLAINT—Filed March 16, 1923

On Application of Complainant for Preliminary Injunction and on Motion of the United States to Dismiss the Petition

This cause coming on to be heard before the undersigned, the several parties thereto being present by their respective counsel, was submitted on Complainant's application for an interlocutory injunction as prayed for in its bill of complaint, and on motion of the defendant the United States of America that said bill of complaint be dismissed; thereupon, upon consideration, it is ordered, adjudged and decreed that said application for an interlocutory injunction be, and the same is, denied; it is further ordered, adjudged and decreed that said motion of the defendant the United States of America be, and the same is, granted, and that said bill of complaint be, and the same is, dismissed; it is further ordered, adjudged and decreed that the defendants have and recover of the Complainant the costs

[fol. 107] of the suit, to be taxed by the Clerk, for which execution may issue.

Dated March 15th, 1923.

(Signed) R. W. Walker, United States Circuit Judge.
(Signed) Alex. C. King, United States Circuit Judge.
(Signed) Rufus E. Foster, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

PETITION FOR APPEAL AND ORDER OF ALLOWANCE—Filed April 7, 1923

The above named Complainant, Dayton-Goose Creek Railway Company, considering itself aggrieved by the Order and Decree entered on the 15th day of March, 1923, in the above entitled proceeding, denying its application for an interlocutory injunction and dismissing its petition or bill of complaint, prays that an appeal may be allowed it from said Order and Decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors filed herewith, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

[fol. 108] (Signed) Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Complainant and Appellant, Dayton-Goose Creek Railway Company, Union National Bank Building, Houston, Texas.

April 6, 1923.

And now, to-wit, on the 6th day of April, 1923, the above named petitioner having filed its Assignment of Errors and otherwise conformed to the statutes and rules in such case made and provided, it is ordered that the appeal be allowed as prayed for in the foregoing petition, and made returnable on the 5th day of May, 1923; and the Clerk is directed to transmit forthwith to the Supreme Court of the United States a properly authenticated transcript of the record, papers and proceedings.

(Signed) R. W. Walker, Circuit Judge. Alex. C. King, Circuit Judge. Rufus E. Foster, District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 7, 1923

[fol. 109] *Assignment of Errors*

Comes now Dayton-Goose Creek Railway Company, Appellant, and makes and files this its Assignment of Errors, and says that the District Court of the United States for the Eastern District of Texas and the Judges thereof, in the opinion, order and decree herein, dated March 15, 1923, erred in the following and each of the following respects, to-wit:

1. In denying and refusing Appellant's application for an interlocutory injunction as prayed for in its petition herein.

2. In granting the motion of the Defendant, The United States of America, to dismiss Appellant's petition, and in dismissing the same.

3. In holding and deciding that, as to Appellant, the Act of Congress referred to in its petition herein, and the orders of the Interstate Commerce Commission entered in pursuance thereof and likewise referred to, are valid, constitutional and enforceable to the extent of that portion of Appellant's earnings thereby required to be paid to the Interstate Commerce Commission, as levying and assessing a tax.

4. In failing and refusing to hold and decide that said Section 15a and said orders of the Interstate Commerce Commission do not impose or assess a valid tax upon Appellant, for that if by said Section a tax was sought or intended to be assessed or imposed, the same is unconstitutional and void because in contravention of Section 7 of Article I of the Constitution of the United States, which provides that all bills for raising revenue shall originate in the House of Representatives but the Senate may propose or concur with amendments as on other bills.

[fol. 110] 5. In holding and deciding that the part of the income of Appellant required by said Act and by said orders to be paid to the Interstate Commerce Commission was not collected by Appellant absolutely as its property but that the same was earned and collected under the terms of the Transportation Act, 1920, in trust for the United States.

6. In holding and deciding that Appellant during either of the periods involved in this suit had any excessive income or earnings.

7. In holding and deciding that Appellant does not contend that the part of its net revenue from its railway operations, which, under the provisions in question, it is permitted to retain, is less than a fair and remunerative return on its investment in road and equipment.

8. In failing to give full and due consideration to the undisputed evidence to the effect that the value of Appellant's property held for and used in the service of transportation and therefore a fair return upon such value was and is far in excess of the amounts shown on the reports made by Appellant to the Interstate Commerce Commission for the respective periods involved.

9. In assuming, holding and deciding that in the several years during which Appellant may be obliged to pay liabilities which accrued during one or both of the periods involved in this suit, Appellant will have so-called excess earnings equal to or in excess of the amount of such payments and that Appellant will thereby secure the same full benefit of deducting such payment or payments as would be afforded by a provision for a refund by the Interstate Commerce Commission to Appellant, based upon actual payments of liabilities accrued in previous accounting periods during which so-called excess earnings existed.

[fol. 111] 10. In holding and deciding that what are proper deductions to be made from gross income for the ascertainment of net income for a given period is a matter for legislative rather than judicial determination.

11. In holding and deciding that it may well be questioned whether a claim for overcharge would be sustained where a rate approved by the Commission was charged.

12. In holding and deciding that it hardly lies in the mouth of Appellant to suggest that the rates charged by it will be considered unreasonable where fixed by it within a maximum allowed by the Interstate Commerce Commission.

13. In holding and deciding that Appellant could not be made liable by a shipper as for an overcharge for any moneys paid there-from to the United States under the terms of the Interstate Commerce Act.

14. In holding and deciding that Appellant has no right to restrain the Government from collecting from it so-called excess earnings which accrued to it from the collection of excessive charges; for that the Interstate Commerce Act expressly imposes liability upon Appellant for all such amounts so collected by it, and the shipper damaged thereby has two years in which to file his claim against Appellant; and if Appellant may be compelled to pay to the Government any sum accruing from such collections and then later be required to respond to the claim of the shipper when the Interstate Commerce Commission has determined the fact and amount of damage, the result would be the payment of a part of such excess to the Government and a subsequent payment to the shipper, out of Appellant's own funds, of the full amount of the excess, resulting in a double recovery against Appellant, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 112] 15. In holding and deciding that Appellant may be compelled to pay to the Interstate Commerce Commission a portion of the money accruing to it from the exaction of an unreasonable rate and then subsequently be compelled to pay to the shipper as reparation the amount to the extent of which the rate may be determined to have been unreasonable, being a part of the so-called excess earnings already paid to the said Commission.

16. In holding and deciding that as to Appellant the requirements of Section 15*a* of the Interstate Commerce Act, and said orders of the Interstate Commerce Commission entered in pursuance thereof, and each of them, with respect to the payment of money to the Interstate Commerce Commission by Appellant, are not, as to Appella null and void, because taking Appellant's private property with due process of law and without compensation, in contravention the Fifth Amendment to the Constitution of the United States.

17. In holding and deciding that, as to Appellant, Section 15*a* of said Act, and said orders of the Interstate Commerce Commission, and each of them, requiring a certain portion of Appellant's earnings to be placed in a reserve fund, and prohibiting the use of such fund except for certain limited purposes, are not as to Appellant null and void, because taking Appellant's private property without due process of law and without compensation in contravention of the Fifth Amendment to the Constitution of the United States.

18. In failing and refusing to hold and decide that the property of Appellant and the entire income, revenues, earnings and profits arising therefrom are the private property of Appellant and that said Act and said orders, insofar as they attempt to require the payment of money by Appellant to the Interstate Commerce Commission, and into said reserve fund, are in violation of the Fifth Amend-[fol. 113] ment to the Constitution of the United States and therefore void as taking Appellant's private property without just compensation and without due process of law.

19. In failing and refusing to hold and decide that the provisions of said Act and said orders requiring a portion of Appellant's so-called excess earnings to be placed in a reserve fund to be drawn upon for specific and limited purposes only, deny to Appellant, without due process of law, and without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States, the liberty of ownership, control, use and disposition of its property.

20. In failing and refusing to hold and decide that said Act and said orders, and each of them, are void insofar as they undertake to regulate, limit or restrict the use or expenditure of so-called excess earnings by Appellant and to require Appellant to pay any portion thereof to the Interstate Commerce Commission, for any purpose, for that the enforcement thereof against Appellant would deny to it the equal protection of the law, subject it to unequal, arbitrary and discriminatory laws and thereby take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

21. In failing and refusing to hold and decide that because Appellant owned and operated its properties long prior to the passage and approval of the Act containing said Section 15*a*, Appellant, under the Constitution of the United States, owned and possessed and has continuously since owned and possessed the right to collect and receive, and to retain and exercise, complete, untrammeled and unrestricted dominion and control over all revenues, earnings, receipts and income produced by said properties, and that all savings and [fol. 114] earnings resulting therefrom became instantly upon the accrual thereof and continued thereafter to be the private property of Appellant; and, insofar as said section and said orders undertake to compel Appellant to pay to said Commission for public use, or otherwise, or to retain and use only in certain contingencies, and then only for certain limited purposes, any part of such revenues, earnings, receipts and income, said Act and orders are null and void, for that if enforced against Appellant they would deprive Appellant of its liberty and of its private property without compensation and without due process of law, and deny to Appellant the equal protection of the law, in violation of the Fifth Amendment to the Constitution of the United States and of the fixed and vested rights, privileges and immunities which Appellant held and possessed under the Constitution of the United States at the time of the passage and approval of said Act.

22. In holding and deciding that the United States could for any purpose have any interest in or title to any amount or sum of money accruing to Appellant for transportation services not performed for the United States.

23. In failing and refusing to hold and decide that all earnings and income accruing to Appellant from traffic moved on just and reasonable rates is the private property of Appellant and can not be taken without due process of law nor without just compensation consistently with the Fifth Amendment to the Constitution of the United States.

24. In failing and refusing to hold and decide that said Act and orders are void as taking Appellant's private property without due process of law and without compensation in violation of the Fifth Amendment to the Constitution of the United States, in requiring [fol. 115] payment of so-called excess earnings to the Interstate Commerce Commission and into said reserve fund without making reasonable provision for the final determination of the actual net earnings for the year or period involved and for proper refund or adjustment based thereon.

25. In failing and refusing to hold and decide that said Section 15*a* is contradictory in its terms and incapable of enforcement, and that therefore said section, and the orders of the Interstate Commerce Commission predicated thereon, are null and void as to Appellant, because the enforcement thereof would take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

26. In holding and deciding that as to Appellant the provisions of said Section 15*a* and said orders of the Interstate Commerce Commission requiring the payment of money by Appellant to said Commission and into a reserve fund are valid and enforceable and are not, as to Appellant, null and void as an unwarranted regulation of and burden upon, commerce conducted wholly within the State of Texas and the earnings and revenues therefrom, imposed by the Congress of the United States and the Interstate Commerce Commission in contravention of the Tenth Amendment to the Constitution of the United States.

27. In failing and refusing to hold and decide that as to Appellant said Section and said orders in effect impose a direct and unwarranted limitation upon the right of a corporation created under the laws of the State of Texas to earn money from the conduct of commerce carried on wholly within the State of Texas, and in no wise related to interstate or foreign commerce, and not subject to the [fol. 116] control of Congress or of the Interstate Commerce Commission and that said Act and orders are therefore void because in contravention of the Tenth Amendment to the Constitution of the United States.

28. In holding and deciding that the Congress and the Interstate Commerce Commission are not prohibited by the Tenth Amendment to the Constitution of the United States from requiring Appellant to pay to the Interstate Commerce Commission any part of any fund earned by Appellant in purely intrastate commerce within the State of Texas.

Wherefore, Appellant prays that the said order and decree dismissing its petition or bill of complaint and denying its application for an interlocutory injunction be reversed and set aside with directions that said application be granted, and for such other and further relief as may be appropriate.

(Signed) Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Appellant.

Read on Petition for Appeal April 6, 1923.

(Signed) R. W. Walker, Circuit Judge. Alex. C. King, Circuit Judge. Rufus E. Foster, District Judge.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

CITATION ON APPEAL—Filed April 7, 1923

UNITED STATES OF AMERICA, ss:

To the United States of America, the Interstate Commerce Commission, and Randolph Bryant, United States District Attorney for the Eastern District of Texas, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the Clerk's office of the District Court of the United States for the Eastern District of Texas, at Beaumont, wherein Dayton-Goose Creek Railway Company is Appellant and The United States of America, The Interstate Commerce Commission and Randolph Bryant, United States District Attorney as aforesaid, are Respondents, to show cause, if any there be, why the order and decree in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard W. Walker and the Honorable Alexander C. King, United States Circuit Judges, and the Honorable Rufus E. Foster, United States District Judge, sitting in the District Court in pursuance of the Act of October 22, 1913, this 6th day of April, in the year of our Lord, One Thousand Nine Hundred Twenty-three.

(Signed) R. W. Walker, Circuit Judge. Alex. C. King, Circuit Judge. Rufus E. Foster, District Judge.

[fols. 118 & 119] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

APPEAL BOND FOR $1,000.00—Filed April 7, 1923 (Approved: Walker, King, & Foster, JJ.)

[Omitted in printing]

[fol. 120] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

PRÆCIPE—Filed April 7, 1923

To the Clerk of the District Court of the United States for the Eastern District of Texas; Honorable Blackburn Esterline, Assistant to Solicitor General; Honorable Patrick J. Farrell, Chief Counsel Interstate Commerce Commission, and Honorable Randolph Bryant, United States Attorney, Eastern District of Texas.

SIRS:

Please take notice that the Appellant designates the following as the portion of record in this cause to be incorporated into the transcript on its appeal:

1. Complainant's Petition filed December 6, 1922.

2. Answer of the Defendant, the Interstate Commerce Commission.

3. Amended motion to dismiss petition, filed by the defendants, the United States of America and Randolph Bryant, United States District Attorney.

4. Complainant's statement of the Evidence.

5. Opinion dated March 15, 1923.

6. Order and decree dated March 15, 1923.

7. Petition for appeal and order allowing the same.

8. Assignment of Errors.

9. Citation on Appeal.

10. Appeal Bond.

11. This Præcipe.

(Signed) Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Complainant and Appellant, Dayton-Goose Creek Railway Company, Union National Bank Building, Houston, Texas.

[fol. 121] April 6, 1923.

The defendants designate the following matters to be included in the foregoing præcipe and in the transcript, viz:

(1) Certified copy of excerpts from Special Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(2) Certified copy of excerpts from General Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(3) Certified copy of excerpts from order of the Commission, dated April 26, 1921, and effective on and after January 1, 1921, in a proceeding entitled, "in the matter of a uniform system of accounts to be kept by steam roads."

(4) Order, Ex parte 74, July 29, 1920 (58 I. C. C. 220).

It is stipulated and agreed by counsel for the parties that the foregoing enumerated documents shall constitute the record in this cause on appeal and service of the citation on appeal is hereby expressly waived.

(Signed) Frank Andrews, R. H. Kelley, Solicitors for Complainant. Blackburn Esterline, Assistant to the Solicitor General. P. J. Farrell, Solicitor for Interstate Commerce Commission.

[fols. 122–124] In United States District Court

Clerk's Certificate

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and complete transcript of record, assignment of errors, and all proceedings in cause No. 262, in equity, wherein Dayton-Goose Creek Railway Company, is Complainant, and The United States of America, et al., are Defendants, as fully as the same remains on file and of record in my office at Beaumont, Texas; and that the same constitutes the original citation on appeal, annexed hereto.

Witness my hand officially and the seal of said Court, at Beaumont, in said District, this the 1st day of May, A. D., 1923.

J. R. Blades, Clerk U. S. District Court, E. D. T., By H. C. Blades, Chief Deputy. [Seal of United States District Court, Eastern District of Texas.]

Endorsed on cover: File No. 29,622. E. Texas D. C. U. S. Term No. 330. Dayton-Goose Creek Railway Company, appellant, vs. The United States of America, the Interstate Commerce Commission, and Randolph Bryant, United States district attorney for the eastern district of Texas. Filed May 15th, 1923. File No. 29,622.